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In The
Supreme Court of the United States

CAMPUS COMMUNICATIONS, INC.,

Petitioner,

v.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, AND MICHAEL URIBE,

Respondents.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Fifth District

APPENDIX TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI OF TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT AND DALE EARNHARDT, INCORPORATED

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R. App. 1

IN THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

Case No. 5D01-2419

CAMPUS COMMUNICATIONS, INC.,
a Florida corporation, Appellant/Cross-Appellees,

vs.

TERESA EARNHARDT and THE ESTATE OF DALE EARNHARDT, Appellees/Cross-Appellants, and DALE EARNHARDT, JR., TAYLOR EARNHARDT, EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, and MICHAEL URIBE, Appellees.

On Appeal from the Circuit Court of the Seventh Judicial Circuit in and for Volusia County, Florida

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INTRODUCTION

After a three-day bench trial, the court below entered a lengthy order that did not cite a single appellate decision, but that did express strong sentiments regarding privacy rights. On the basis of those sentiments and a law passed specifically to affect this litigation, the court dismissed a complaint to enforce the Public Records Law and ordered the records at issue permanently sealed.

That order should be reversed because the Florida Legislature may not destroy substantive rights through

retroactive legislation; the Florida Legislature may not create exemptions to the Public Records Law that are broader than necessary to serve the purpose of the exemption; and neither the Florida nor the United States Constitution guaranty anyone the right to stop a public official from complying with the Public Records Law.

STATEMENT OF THE CASE AND THE FACTS

Dale Earnhardt, one of the most famous racecar drivers in history, died in a crash in the final lap of the Daytona 500 on Sunday, February 18, 2001. (R. 1670-1696 ¶ 75).

In accordance with chapter 406, Florida Statutes, an agent of the medical examiner of the Seventh District in and for Volusia County, Florida, conducted an autopsy on Earnhardt on Monday, February 19, 2001. (R. 1670-1696 ¶ 92).

Teresa Earnhardt commenced this action on Thursday, February 22, 2001, seeking a temporary and permanent injunction to stop Thomas Beaver, the medical examiner for Volusia County, Florida, from making photographs of the autopsy available to the public and the press. (R.290-301). The Court entered an ex parte temporary injunction on the date that the lawsuit was filed. (R-302-04).

After the *Orlando Sentinel* appeared in the action on March 2, 2001, to oppose sealing of the records (R.315-17, 550-56), and other members of the Earnhardt family and Dale Earnhardt, Inc. (referred to collectively with Teresa Earnhardt as "the Earnhardts") appeared to support

sealing the records (R.347-49), the Court referred the matter to mediation. (R.750-51).

As the mediation was coming to a conclusion on March 16, 2001, Campus Communications, Inc., publisher of *The Independent Florida Alligator*, a newspaper in Gainesville, Florida, submitted a motion to intervene to seek dissolution of the temporary injunction and dismissal of or summary judgment against the complaint. The motion alleged that Campus Communications had asked that it be allowed to inspect and copy the autopsy photographs and that the medical examiner had hot complied with the request. (R.771-803). Campus Communications had not participated in the mediation.

On that same day, March 16, 2001, the parties who had participated in the settlement – the *Sentinel*, additional intervening members of the press (R.755-58), the medical examiner, and the Earnhardts – announced that they had reached an agreement whereby the mediator would appoint an independent expert to review the photographs and audiotapes and would report his findings. (R.766-69). The agreement further provided that after the appointed expert examined the materials at issue they would be permanently sealed. (R.766-69).

The circuit court approved the settlement on March 19, 2001. (R.770).

Ten days later, on March 29, 2001, the Florida Legislature amended the Public Records Law to create an exemption to the Public Records Law for autopsy photographs. Chapter 2001-1, provided in its entirety:

> An act relating to public records; providing an exemption from the public

records law for photographs and video and audio recordings of an autopsy; providing an exemption for certain members of the immediate family, or a representative thereof, or a state or federal agency; prohibiting the custodian of a photograph or video or audio recording of an autopsy from permitting any person to view or duplicate a photograph or video or audio, except pursuant to court order and under the direct supervision of the custodian or his or her designee; exempting criminal and administrative proceedings from the act; requiring certain persons to be parties in a request for access to a photograph or video or audio recording of an autopsy; providing penalties; providing for future legislative review and repeal; providing a finding of public necessity; providing a retroactive effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) A photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt from the requirements of section 119.07(1) and s. 24(a), Art. I of the State Constitution, except that a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records. A local

governmental entity, or a state or federal agency, in furtherance of its official duties, pursuant to a written request, may view or copy a photograph or video or may listen to or copy an audio recording of an autopsy, and unless otherwise required in the performance of their duties, the identity of the deceased shall remain confidential and exempt. The custodian of the record, or his or her designee, may not permit any other person to view or copy such photograph or video recording or listen to or copy an audio recording without a court order. For the purposes of this section, the term "medical examiner" means any district medical examiner, associate medical examiner, or substitute medical examiner acting pursuant to ch. 406, as well as any employee, deputy, or agent of a medical examiner or any other person who may obtain possession of a photograph or audio or video recording of an autopsy in the course of assisting a medical examiner in the performance of his or her official duties.

(2)(a) The court, upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form. In all cases, the viewing, copying, listening to or other handling of a photograph or video or

audio recording of an autopsy must be under the direct supervision of the custodian of the record or his or her designee.

(2)(b) A surviving spouse shall be given reasonable notice of a petition filed with the court to view or copy a photograph or video recording of an autopsy or a petition to listen to or copy an audio recording, a copy of such petition, and reasonable notice of the opportunity to be present and heard at any hearing on the matter. If there is no surviving spouse, then such notice must be given to the deceased's parents, and if the deceased has no living parent, then to the adult children of the deceased.

(3)(a) Any custodian of a photograph or video or audio recording of an autopsy who willfully and knowingly violates this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(b) Any person who willfully and knowingly violates a court order issued pursuant to this section commits a felony of the third degree, punishable as provided in section 775.082, section 775.083, or section 775.084, Florida Statutes.

(c) A criminal or administrative proceeding is exempt from this section, but unless otherwise exempted, is subject to all other provisions of Chapter 119, Florida Statutes, provided however that this section does not prohibit a court in a criminal or administrative proceeding upon good cause shown from restricting or otherwise controlling the disclosure of an autopsy, crime-scene, or similar photograph or video or audio recordings in the manner prescribed herein.

(4) his exemption shall be given retroactive application.

(5) The exemption in this section is subject to the Open Government Sunset Review Act of 1995 in accordance with section 119.15, Florida Statutes, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature.

Section 2. The Legislature finds that it is a public necessity that photographs and video and audio recordings of an autopsy be made confidential and exempt from the requirements of section 119.07(1), Florida Statutes, and Section 24(a) of Article I of the State Constitution. The Legislature finds that photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and often disturbing fashion. Such photographs or video or audio recordings may depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated. As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, could result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as injury to the memory of the deceased. The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of

the deceased to continuous injury. The Legislature further notes that there continue to be other types of available information, such as the autopsy report, which are less intrusive and injurious to the immediate family members of the deceased and which continue to provide for public oversight. The Legislature further finds that the exemption provided in this act should be given retroactive application because it is remedial in nature.

Section 3. This act shall take effect upon becoming a law, and shall apply to all photographs or video or audio recordings of an autopsy, regardless of whether the autopsy was performed before or after the effective date of the act.

Approved by the Governor March 29, 2001.

Filed in Office Secretary of State March 29, 2001.

On April 3, 2001, Campus Communications filed supplemental materials in support of its motion to intervene showing that autopsy photographs historically have played a critical role in press reports about murders, medical malpractice, prison deaths and numerous other public controversies. (R. 1163-1311). In some instances, the press had found that medical examiners themselves have made serious errors in determining the cause of death or have themselves engaged in wrongdoing or questionable practices. (R. 1163-1311 & Exs. 5-7, 9-10, 13, 15-17, 19, 22-51). The supplemental materials also demonstrated that the cause of Earnhardt's death had become a public controversy and that the photographs sought were relevant to that controversy. (R. 1163-1311 & Exs. 2, 4 & 8).

On April 5, 2001, the circuit court granted Campus Communications' motion to intervene. (R.1334). On April

16, 2001, Campus Communications filed a cross-claim against the medical examiner seeking an order under the Public Records Law requiring him to allow inspection and copying of the Earnhardt autopsy photographs. (R.1359-75). The claim asserted that Chapter 2001-1 could not be applied retroactively to this case and, in any event, that the exemption was broader than necessary to serve the purpose for which it had been enacted.

The State of Florida intervened to defend the constitutionality of Chapter 2001-1. (R.1376-79).

The medical examiner answered Campus Communications' complaint on May 2, 2001, admitting that the records sought by Campus Communications were public records and that they were not exempt from the disclosure requirements of that law at the time that they had been requested, but asserting that he had been prevented from allowing access to the records by the temporary injunction that had been entered by the circuit court. (R.1415-17).

The State answered the complaint on May 9, 2001, asserting that the Chapter 2001-1 was constitutional. (R.1452-54). The State took no position regarding the constitutionality of the Public Records Law prior to its amendment even though the Earnhardts contended in their complaint that the law invaded their state and federal constitutional rights.

The Court set the case for a bench trial to begin on June 11, 2001.

During the first day of the trial, the Court heard testimony from Thomas Beaver, the Volusia County medical examiner. Dr. Beaver testified that "it's important that we, as a society, know why people die, because . . . it

helps us to identify risks to the society as a whole." (T. 200). He testified that historically his office had treated autopsy reports, including autopsy photographs, as public records and had released the reports and photographs upon the request of any member of the public for inspection and copying. (T. 202 & R. 1670-1696 ¶ 35).

He testified that he did not follow that practice in this case because of the temporary injunction entered by the circuit court. (T. 223).

In admissions filed with the Court, Dr. Beaver also testified that as medical examiner for the Seventh District, he is responsible for investigating all deaths resulting from homicide, accidents or in sudden unexpected circumstances, that he oversees about 650 autopsies annually, and that his office has a staff of approximately 11 and an annual budget of approximately $1.1 million. (R. 1670-1696 ¶¶ 27, 28 & 32).

Prior to this lawsuit, when a member of the public had asked to inspect or copy the autopsy records relating to a specific deceased person, that member of the public would be allowed to inspect and copy all autopsy records relating to the deceased person, including autopsy photographs, videotapes, and audiotapes. (R. 1670-1696 ¶ 38). More than 50 members of the public had inspected and copied autopsy records maintained by Beaver within the 12-month period preceding February 22, 2001. (R. 1670-1696 ¶¶ 39 & 40). Beaver did not have a policy of requiring notification of relatives of a deceased person before allowing such access (R. 1670-1696 ¶ 41) and rarely was such notification given. (R. 1670-1696 ¶ 42).

Prior to this litigation, individuals who had copied autopsy photographs had not used them for harmful

purposes (R. 1670-1696 ¶ 43) and no one had ever asked Beaver to deny members of the public the opportunity to inspect or copy autopsy photographs, videotapes, or audiotapes of a deceased person. (R. 1670-1696 ¶ 44).

Individuals who previously had asked for and obtained access to autopsy photographs included reporters, privately-employed medical doctors, privately-employed pathologists, privately-employed investigators, educators, medical researchers, sociologists, and acquaintances and relatives of the deceased (R. 1670-1696 ¶ 45) and these individuals sometimes expressed disagreement with the conclusions of the medical examiner regarding the cause of death after they reviewed the photographs. (R. 1670-1696 ¶ 48). Beaver himself had worked as a consultant in civil and criminal litigation and found it essential to review any autopsy photographs for that purpose. "[T]he first thing I ask the attorney for are the pictures," he testified. (T. 235).

Medical examiners are not the only public officials who take photographs of deceased persons, according to Beaver. Photographs of the deceased are also taken by law enforcement officials in some cases (R. 1670-1696 ¶ 53), although that was not done in the instant case. Those photographs are not kept the custody of the medical examiner, they are kept by law enforcement agencies. (R. 1670-1696 ¶ 54).

Medical examiners also sometimes take photographs of deceased persons other than autopsy photographs. For example, they take photographs at the scene of an accident or before an autopsy is commenced. (R. 1670-1696 ¶ 55, 56 & 58). Such photographs are not autopsy photographs. (R. 1670-1696 ¶ 59).

Autopsy photographs historically have been used for a wide variety of purposes. Beaver himself has given lectures on autopsies or autopsy investigations (R. 1670-1696 ¶ 64) and he has displayed photographs of autopsies for educational or training purposes to law enforcement officials, medical students, physicians, forensic pathologists, paramedics, and nurses. (R. 1670-1696 ¶ 65). He also has shown autopsy photographs to other medical examiners or pathologists for the purpose of seeking a second opinion (R. 1670-1696 ¶ 66) and to consultants for the purpose of seeking an expert opinion. (R. 1670-1696 ¶ 67).

In addition to providing the Court with background regarding the historical treatment and use of autopsy photographs, Beaver also explained the events leading up to this litigation. In his admissions, he acknowledged that in the week before Earnhardt died, the *Orlando Sentinel* had published a series of investigative news reports that were highly critical of the National Association for Stock Car Auto Racing, Inc. ("NASCAR"), sponsor of the Daytona 500, for failing to require head and neck restraint systems that could prevent basilar skull injuries in high speed crashes. The articles pointed out that three NASCAR drivers had died in NASCAR races in the previous nine months of head and neck injuries. The articles reported that other racing organizations had required the use of head and neck restraint systems to prevent such injuries.[1]

[1] Specifically, on February 11, 2001, the *Orlando Sentinel* published an article entitled "NASCAR idles while drivers die." (R. 1670-1696 ¶¶ 68 & 69 and attachments). On February 13, 2001, the *Orlando Sentinel* published an article entitled "Safety slow to arrive despite race carnage." The same day, the *Orlando Sentinel* published an article

(Continued on following page)

Immediately after Earnhardt's death on February 18, 2001, Dr. Steve Bohannon, director of emergency medical services for the International Speedway Corporation, reported to the press that Earnhardt had died of a basilar skull injury – precisely the same type of injury that had killed the three NASCAR drivers that had been the subject of the *Orlando Sentinel's* critical reports. (T. 354). Bohannon reiterated his conclusion at a press conference the following day. (T. 354). To confirm Bohannon's conclusions, reporters requested records from the medical examiner concerning the autopsy of Earnhardt. (R. 1670-1696 ¶ 104). They did not initially, however, request photographs of the autopsy. (R. 1670-1696 ¶ 105).

On Wednesday, February 21, 2001, however, Bohannon, asked the medical examiner's staff to allow him to inspect the photographs of the autopsy of Dale Earnhardt. (R. 1670-1696 ¶ 117) (T. 353 & 361). The medical examiner, consistent with his prior practices, did not advise any relatives of Earnhardt of this request (R. 1670-1696 ¶ 118) and allowed Bohannon's inspection to go forward. (R. 1670-1696 ¶ 119-121). Bohannon was unable to determine from his inspection of the photographs whether Earnhardt's fatal injury had been caused by inertial head-whipping that could have been stopped by a head and neck restraint, seat belt failure, or some other cause. (T. 365).

After examining the photographs that day, Bohannon reported the results of his inspection to Mike Helton, the

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entitled "NASCAR drivers want own medical staff." (R. 1670-1696 ¶ 70).

president of NASCAR. (T. 366). Helton told Bohannon that Earnhardt's seatbelt had failed. (T. 365-66).

On Thursday, February 22, 2001, Teresa Earnhardt filed this lawsuit against the medical examiner (R. 1670-1696 ¶ 127) even though no reporter had requested access to or copies of photographs of the body of Dale Earnhardt during or before the autopsy. (R. 1670-1696 ¶ 128). On the same day that the suit was filed, the circuit court entered a preliminary injunction prohibiting release of the photographs. (R. 302-04).

On Friday, February 23, 2001, NASCAR sponsor of the Daytona 500, held a press conference in Rockingham, North Carolina, at which they announced that Earnhardt's seat belt had failed and that they did not know why. (R. 1670-1696 ¶ 130) (T. 369). Bohannon attended the press conference and expressed the opinion that the failure of the seat belt could have been the mechanism that caused the injury that caused Earnhardt's death. (T. 369).

After the NASCAR press conference of February 23, 2001, reporters for the first time requested access to photographs of the Dale Earnhardt autopsy. (R. 1670-1696 ¶ 132). The autopsy photographs would show the cause of Dale Earnhardt's death. (R. 1670-1696 ¶ 137). The mediation ordered by the circuit court between the Earnhardts, the *Orlando Sentinel* and other media (not including Campus Communications) resulted in an agreement between the mediating parties (R.766-69) that the mediator would appoint an independent expert to examine the photographs for no more than 30 minutes and then issue a report concerning the cause of Earnhardt's death. Pursuant to the agreement, the report would be filed with the Court and the photographs then would be "totally and

permanently sealed in the most secure manner possible." (R. 768).

On or about March 26, 2001, Dr. Barry Myers reviewed the autopsy of Dale Earnhardt, including the photographs of the autopsy. (R. 1670-1696 ¶ 138). He then issued a report on April 9, 2001, expressing his opinions regarding the cause of Earnhardt's death. (R. 1345-58).

The Myers' report did not, however, put an end to the controversy concerning either the cause of Earnhardt's death or whether NASCAR had tried to deflect criticism of its safety requirements. Instead, with the photographs still under seal, the report simply fueled further debate in the national press.[2] (R. 1941-82 Exs. 62-77 & 2395-2404). The circuit court held that press reports concerning the controversies surrounding Earnhardt's death were irrelevant to the issues before him and he excluded them from evidence. (R. 275).

At the conclusion of the first day of the trial, the circuit court announced that he had found "that the legislative enactment of Chapter 2001-1 was a valid and constitutional exercise of legislative authority, pursuant to Article 1, Section 24, of the Florida Constitution." (R. 281).

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[2] For example, on April 30, 2001, the *San Diego Union-Tribune* reported: "NASCAR disputes Earnhardt story." On May 1, 2001, the *Wisconsin State Journal* reported: "Earnhardt's son still believes seat belt broke." Also on the same day, *The Dallas Morning News* reported: "Woman's comments help Earnhardt seatbelt debate intensify." The following day, May 2, 2001, MSNBC headlined a report: "NASCAR knows the truth behind death." A day after that, May 3, 2001, *USA Today* reported: "Earnhardt Jr. confident in NASCAR's probe." Also on that day, *NASCAR Scene Plus* reported: "NASCAR's credibility is being shredded by 'Beltgate.'" (R. 1941-82 Exs. 62, 63, 64, 65, 66, 68 & 69).

The trial court then invited Campus Communications to attempt to show that it had "good cause" for obtaining access to the photographs pursuant to the standards set forth in Chapter 2001-1. (R. 281).

In response to that invitation, Campus Communications offered testimony of Daytona Beach Police Department Sgt. Thomas Youngman, a police photographer (T. 323-51), Dr. Steve Bohannon (T. 352-99), and Teresa Earnhardt (T. 406-82). Collectively, this testimony showed that autopsy that the Earnhardt autopsy photographs already had been made available to Bohannon and to Myers, that access to the photographs was relevant and important to resolution of the controversy concerning Earnhardt's death and NASCAR's safety requirements, and that while Mrs. Earnhardt asserted that she would be distressed by anyone having any access to the photographs, that public access would not in fact injure her or others.

Campus Communications also again urged the Court to consider the numerous news reports showing the controversy that existed regarding the cause of Earnhardt's death and NASCAR's assertion that Earnhardt's seat belt failure, rather than its lack of safety requirements, had caused Earnhardt's death. (T. 478-81). The circuit court again declined to consider the news reports and excluded them from evidence. (T. 482).

The circuit court then heard, over a relevance objection by Campus Communications (T. 482-83), testimony from Michelle Bonnett and Beacher Orr, relatives of two NASCAR drivers who also had been killed in crashes at the Daytona International Speedway. (T. 488-531).

After lengthy closing arguments (T. 556-732), the trial judge orally announced a ruling that even though Campus Communications had asked for access to the photographs on March 16, 2001, and the Legislature had not created an exemption for the photographs until March 29, 2001, Campus Communications had no right of access to the photographs other than that provided under the amended law and that Campus Communications had not shown that it was entitled to access under the amended law. (T. 735-40).

He found that any bearing that the photographs might have on NASCAR's safety requirements was irrelevant because "that's a private matter that does not involve the Government at all." (T. 737). He acknowledged that review of the photographs might show that the medical examiner's "office procedures ... could be different ... [a]nd the investigation by the Daytona Beach Police Department" might have been conducted differently, but "these are incredibly thin excuses to invade the serious privacy rights of the family." (T. 738).

The trial judge also rejected the Earnhardts' assertion that they had any state or federal constitutional right to require the sealing of the photographs. "Judgment shall be entered in favor of Campus Communication, Inc. ... on the action pursuant to Article I, Section 23 of the Florida Constitution and the 14th Amendment to the United States Constitution. The temporary injunction shall be dissolved." (T. 741).

Counsel for the Earnhardts then submitted a proposed final judgment that, contrary to the circuit court's oral ruling, not only dismissed Campus Communications' complaint seeking access to the records, but also entered a

permanent injunction sealing the records. Campus Communications objected to the proposed final judgment. (R. 2432-68). The trial judge nevertheless entered the judgment in the form submitted by the Earnhardts' counsel (R. 2469-81), contradicting his own oral ruling.

Campus Communications moved for a new trial based on the trial judge's exclusion of news reports showing that the records sought were relevant to an important public controversy.[3] (R. 2486-91). The trial judge denied that motion. (R. 2492).

Thereafter, Campus Communications timely appealed the final judgment. (R. 2493). Teresa Earnhardt and the Estate of Dale Earnhardt cross-appealed, explicitly acknowledging that the trial judge's oral ruling and his written final judgment were at odds and stating that they would like to contest the oral ruling if it were regarded as controlling over the written ruling. (R. 2501).

SUMMARY OF ARGUMENT

Point I – Chapter 2001-1 is Unconstitutional. Chapter 2001-1 is unconstitutional for two reasons: (A) it violates due process by retroactively destroying the right that Campus Communications had to inspect and copy the records at issue at the time that it made its request, (B) it violates article I, section 24 of the Florida Constitution because it is broader than necessary to serve the purpose for which it was enacted. The Legislature could have

[3] The excluded news reports are in the record at R. 934-61 and R. 1941-82.

achieved its objective of preventing widespread dissemination of autopsy photographs on the Internet by allowing inspection of the photographs without copying. The availability of this more narrowly tailored means of achieving the objective invalidates the broad exemption from both inspection and copying requirements.

Point II – The Plaintiffs Have No Constitutional Right to Block Compliance with the Public Records Law. The Florida Supreme Court has repeatedly held that there is no state or federal constitutional right that allows individuals to seek injunctions against public officials to stop them from complying with a requirement of the Public Records Law. For that reason, the trial court's oral ruling rejecting the Earnhardt's request for a permanent injunction was correct and the written final judgment granting the permanent injunction should be reversed.

ARGUMENT

I.

Chapter 2001-1 is Unconstitutional

The trial court erred in holding that Chapter 2001-1 can be applied to deny access to the records at issue. The law is facially unconstitutional in several respects.

A. Chapter 2001-1 May Not be Applied Retroactively.

In *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438 (Fla. 2001) ("*Memorial Hospital II*"), the Florida Supreme Court affirmed this Court's decision requiring the release of certain hospital records. This Court had concluded that release of those records was required notwithstanding the enactment of

legislation exempting the records from the disclosure of the Public Records Law because the Florida Supreme Court had "reject[ed] the contention that the amended statute should be applied retroactively." *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 384 (Fla. 1999) ("*Memorial Hospital I*"). Upon appeal, this Court interpreted the new legislation as intended to apply retroactively, but held it could not constitutionally be applied retroactively. *News-Journal Corp. v. Memorial Hospital-West Volusia, Inc.*, 695 So. 2d 418 (Fla. 5th DCA 1997).

In its recent decision, the Florida Supreme Court disagreed with this Court's conclusion that the legislature intended to apply the new legislation retroactively. It ruled that no such intention could be found. The Florida Supreme Court therefore had no need to decide whether the Florida Legislature has constitutional authority to enact retroactive Public Records Law exemptions. That decision, however, leaves in place this Court's 1997 *Memorial Hospital* decision which did hold that exemptions cannot constitutionally be applied retroactively. This Court should adhere to that decision.

Not only does this Court's *Memorial Hospital* decision require reversal of the decision below, but so also does a long line of decisions governing substantive rights.[4] In

[4] *See Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999); *see also Bitterman v. Bitterman*, 714 So. 2d 356, 363 (Fla. 1998) ("Substantive rights cannot be adversely affected by the enactment of legislation once those rights have vested"); *Gupton v. Vill. Key & Saw Shop, Inc.*, 656 So. 2d 475, 477 (Fla. 1995) (a substantive law that interferes with vested rights will not be applied retroactively); *Alamo Rent-a-Car, Inc. v. Mancusi*, 632 So. 2d 1352 (Fla. 1994); *Rupp v.*

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Memorial Hospital II, the Florida Supreme Court reaffirmed its view that the right of access granted by the Public Records Law and article I, section 24 of the Florida Constitution "is a substantive right."[5] Classification of the right of access as substantive is significant because "retroactive abolition of substantive vested rights prohibited by due process considerations."[6]

There can be no doubt but that Campus Communications' substantive right of access to the records at issue vested prior to the March 29, 2001, enactment of chapter 2001-1, because the records came into the public domain on February 19, 2001, the date on which the autopsy was conducted. The Public Records Law operates to "place[ ] the books on the table." *Tribune Co. v. Cannella,* 458 So. 2d 1075, 1078 (Fla. 1984)[7] In addition, Campus

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Bryant, 417 So. 2d 658, 661 (Fla. 1982) ("[D]ue process considerations . . . prohibit retroactive abolition of vested rights") (holding statute expanding public officer immunity could not retroactively abolish "right to seek recovery" asserted in pre-enactment suit); *State Dep't of Transp. v. Knowles*, 402 So. 2d 1155 (Fla. 1981) (holding same statute could not constitutionally diminish a pre-enactment non-final jury award against newly immunized officer).

[5] *See Mem. Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438, 441 (Fla. 2001) ("*Memorial Hospital II*"); *see also Allen v. Butterworth*, 756 So. 2d 52, 66 (Fla. 2000) (holding legislature "has the authority to define the substantive right to public records" but not the power to regulate "the procedure for public records production in capital cases"); *Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999) (construing public records law as substantive).

[6] *Chase Fed. Hous. Corp.*, 737 So. 2d at 503.

[7] The law plainly had that impact because Steve Bohannon was allowed to inspect the records on February 21, 2001. The prior release of records to a member of the public undermines the justification for withholding the records from other members of the public. *See, e.g., United States v. Camacho,* 22 Media L. Rep. (BNA) 1845, 1849-50 (S.D.

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Communications requested the records on March 16, thirteen days before enactment of chapter 2001-1. At the time that the request was made, the medical examiner had no statutory basis to deny the request and he asserted no basis to deny the request. The only basis for denying the request was the improvidently granted temporary injunction that the trial judge ultimately vacated. Campus Communications was entitled to production of the records at the time that it made its request. In *Cannella,* the Florida Supreme Court held that delay in the production of public records is antithetical to the purpose of the law. "Delaying inspection . . . is not within the legislative scheme." *Id.* at 1076.

Section 119.11, Florida Statutes, plainly recognizes the immediate vesting of the right to inspect and copy records in its creation of not only a right to seek immediate judicial enforcement of the statute, but also a right to an expedited judicial determination of such a claim. Significantly, Campus Communications' right to inspect and copy the records arose not only under chapter 119, but also under article I, section 24(a), of the Florida Constitution which provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, other persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, section 24(a), adopted in 1992, "elevated

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Fla. 1994) (allowing CNN access to victim photographs where other members of the press previously had access to same photographs) (Marcus, J.).

the public's right to government in the sunshine to constitutional proportions."[8]

Article I, section 24(c) of the Florida Constitution specifies that the right of access "shall be self-executing"[9] Thus, even independent. of the clear and specific mechanism of chapter 119, Campus Communications' right of access to the records at issue would have vested by virtue of the mandate of article I, section 24(a).

That the Legislature may have been contemplating legislation to create an exemption to the disclosure requirements of the Public Records Law and to article section 24(a) at the time that Campus Communications submitted its request could not have prevented Campus Communications' rights from vesting at the time of its request or earlier. To hold otherwise would authorize every public official to withhold public records merely because of the mere possibility that legislation would be passed to exempt the requested record from the law.[10] This could eviscerate the law by authorizing the indefinite withholding of records whenever there was a possibility of new

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[8] *Zorc v. City of Vero Beach,* 722 So. 2d 891, 896 (Fla. 4th DCA 1998) *citing Monroe County v. Pigeon Key Historical Park, Inc.,* 647 So. 2d 857 (Fla. 3d DCA 1967).

[9] A self-executing right "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without aid of legislative enactment." *Gray v. Bryant,* 125 So. 2d 846, 851 (Fla. 1960).

[10] Because Campus Communications submitted its request for access to records *before* the Legislature acted, the Court need not decide in this case whether a member of the press or public that requested the records *after* the Legislature acted would have a vested substantive right.

legislation. Would the filing of a bill alone be regarded as a sufficient basis for a public records custodian to withhold a record? Would committee action be sufficient? Should courts stop enforcing the law if its repeal is simply advocated? Could a public official be deemed to have violated the law if he or she withheld a record because the law might be amended, but it was not? How long should courts await legislative action? These questions demonstrate that the rule of law must be that a public records custodian may not withhold records once they have been requested even though a prospect exists for the law to change.

Traditional principles governing the determination of whether a statute can, consistent with due process, be applied retroactively, also lead to the conclusion that Campus Communications' right to inspect and copy the photographs, videotapes, and audiotapes vested. "Despite formulations hinging on categories such as 'vested rights' or 'remedies,' it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected."[11]

The right of access to public records always has been regarded as a paramount value in Florida.[12] It assures government accountability and protects the public and individuals against both negligence and corruption.

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[11] *Knowles,* 402 So. 2d at 1158.

[12] *See generally Shevin v. Byron, Harless, Schaffer, Reid & Assocs.*. 379 So. 2d 633, 640 (Fla. 1980).

Abrogation of the right is complete. Although the legislation creates the possibility that records may be released through a court order in some circumstances,[13] it cannot be denied that in many instances that new law denies access to records that previously had been allowed. Indeed, in this case the Earnhardts successfully argued that Chapter 2001-1 had destroyed Campus Communications' right of access.[14] Finally, the nature of the right affected is

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[13] The criteria specified by the Legislature for allowing access are themselves constitutionally deficient because they invite, if not require, judges to deny access based on the viewpoint of the requester. Even if the state has no constitutional obligation to grant access, see *L.A. Police Dep't v. United Reporting Pub'g Corp.*, 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez*, 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School*, 121 S. Ct. 2093 (2001) (exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac*, 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access] to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R. 2469-81 at ¶¶ 15-16) (referencing past and future publications of the requesters as justification for denying access). Both the order and Chapter 2001-1 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

[14] *But see* Point II *infra*. Before enactment of chapter 2001-1, records could be accessed irrespective of the reason for which they were

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fundamental. Through their adoption of article I, section 24 of the Florida Constitution, the people of the State of Florida eliminated any doubt that the Courts should accord their right of access fundamental stature. *Memorial Hospital II,* 784 So. 2d at 481. Today, the right of access to public records is plainly a substantive, vested right that the Legislature cannot, consistent with due process, destroy through retroactive legislation.[15]

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sought. *See Booksmart Enters., Inc. v. Barnes & Noble Coll. Bookstores, Inc.,* 718 So. 2d 227, 228, n.2 (Fla. 3d DCA 1998) ("reason for wanting to view and copy the documents is irrelevant"); *Staton v. McMillan,* 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub nom., Staton v. Austin,* 605 So. 2d 1266 (Fla. 1992) (reasons for seeking access "are immaterial"); *Lorei v. Smith,* 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) ("legislative objective ... was to insure ... the right freely to gain access to governmental records. The purpose for such inquiry is immaterial."), *review denied,* 475 So. 2d 695 (Fla. 1985); *News-Press Publishing Co. v. Gadd,* 388 So. 2d 276, 278 (Fla. 2d DCA 1980) ("the newspaper's motives [for seeking the documents], as well as the hospital's financial harm and public harm defenses, are irrelevant in an action to compel compliance with the Public Records Act").

[15] In *City of Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986), the Supreme Court held that the Legislature could apply a "remedial" exemption to the Public Records Law without violating due process. The statute at issue in that case, an exemption for the work product of an agency attorney, unlike the chapter 2001-1, did not impose on requesters of the records a requirement that they show good cause. Instead, that statute, section 119.07(3)(o), Florida Statutes (1984 Supp.), simply *postponed* the time at which a requester could have access to the records until after the conclusion of the litigation. The work product exemption therefore could be classified as "remedial" in nature because it merely delayed the release of the records. By contrast, chapter 2001-1 entirely destroys the right of access unless the requester demonstrates good cause to a court. The requester who refuses to or who cannot demonstrate good cause will have no right at all even though his or her right would have been absolute prior to enactment of chapter 2001-1. *Desjardins* is also distinguishable in that

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B. The Legislature Violated Article I, Section 24 of the Florida Constitution by Enacting Chapter 2001-1

The Florida Legislature violated article I, section 24(c) of the Florida Constitution when it adopted chapter 2001-1 in that the Legislature did not state with specificity the public necessity for the law and the law is broader than necessary to accomplish the stated purpose of the law. Article I, section 24(c) states that to enact an exemption to the disclosure requirements of article I, section 24(a), the Legislature first must "state with specificity the public necessity justifying the exemption" and then must tailor the exemption so that it is "no broader than necessary to accomplish the stated purpose of the law."

The Florida Supreme Court has applied this constitutional provision only once, in *Halifax Hospital Medical Center v. News-Journal Corp.,* 724 So. 2d 567, 569 (Fla. 1999). In that case, the circuit court invalidated an exemption created for "critical confidential information" in the possession of public hospitals. Circuit Judge John V. Doyle held:

> The evidence in this case thus showed and the Court finds that not all aspects of written strategic plans are critical and confidential. . . . By creating an exemption for any and all discussion of

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it was rendered six years before the adoption of article I, section 24, Fla. Const., and well before *Memorial Hospital II,* All substantive rights are protected by due process against retroactive destruction. In *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422 (Fla. 1994), the Court made clear that *Desjardins* does not allow the Legislature to destroy substantive vested rights.

> the strategic plan, the legislature has created a categorical exemption which reaches far more information than necessary to accomplish the purpose of the exemption. All discussion of strategic plans is made secret solely to protect that part of the discussion which pertains to critical confidential information. This is facial overbreadth.

Id. at 570 (quoting the final judgment). The defendant had asked the circuit court to narrow the exemption by defining what constitutes "critical and confidential information," but the circuit court declined that request, holding that "such a finding is fundamentally legislative rather than judicial." *Id.* at 569.

This Court affirmed, agreeing that not all aspects, of written strategic plans are critical and confidential and that it should not attempt to save the statute by a narrowing judicial construction. *Id.* The Court held the statutory exemption "overbroad on its face."

The Florida Supreme Court agreed with this Court that "the statutory exemption does not meet the exacting constitutional standard of article I, section 24(c), of specificity as to stated public necessity and limited breadth to accomplish that purpose and is therefore facially unconstitutional." *Id.*

In response to the defendant's request for a judicial narrowing of the exemption to save it, the Supreme Court acknowledged a statute should be construed so as not to conflict with the constitution, but held that "a court's discretion to adopt a narrowing construction should be exercised with restraint." *Halifax Hospital Medical Center,* 724 So. 2d at 570. The Court held, "we find in this case that we cannot move into the legislature's province by

making the factual determination that would bring this statutory exemption within constitutional boundaries. A court may not have the fact-finding machinery to enable it to authoritatively construe a statute and supply a saving construction." *Id.*

The Court observed: "In this case, we do not have before us the relevant information to define 'critical confidential information' or 'strategic plans' for which disclosure would harm the business interests of the hospital. Moreover, in enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose. Thus, the task of enacting more limited statutory exemption appropriately belongs to the legislature in this case." *Id.*

In applying article I, section 24(c) and the holding of the *Halifax* case to this case, this Court must first examine the articulated "public necessity" that justifies enactment of the exemption. This articulation is found in section 2. It provides, in pertinent part, that "photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and *often* disturbing fashion." (Emphasis added). It further states "Such photographs or video or audio recordings *may* depict or describe the deceased nude, bruised, bloodied,, broken, with bullet or other wounds, cut open, dismembered, or decapitated." (Emphasis added). It then concludes that "As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, *could* result in trauma, sorrow, humiliation, or emotional injury to the immediate family of the deceased, as well as

injury to the memory of the deceased." Each of these sentences reflects that the Legislature regarded chapter 2001-1 as necessary because access to the materials at issue could, in *some* circumstances, inflict emotional injury on the immediate family of the subject of those materials.

In choosing the word "often" rather than "always," the word "may" rather than "do," and the word "could" rather than "will" or "would," the Legislature explicitly acknowledged that the viewing, copying or publicizing of photographs does not always result in trauma, sorrow, humiliation, or emotional injury.[16] The exemption therefore is overbroad on its face in the same way that the exemption in *Halifax* was overbroad on its face. The Legislature

[16] The Legislature not only has acknowledged through its choice of words that access to autopsy photographs, videotapes, and audiotapes will always not inflict emotional harm, it also has acknowledged that in some circumstances the value of unfettered access to such materials outweighs any risk that emotional harm will be inflicted by the access. It does the latter by stating that "a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording off the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records." Presumably the Legislature included this provision because spouses, parents and children often will have a need for such records for insurance and estates purposes. That obviously would not always be the case. In some instances, an individual who is within the exemption – for example, an estranged spouse, parent, or child – might well be the one individual who is *most* likely to misuse the materials to inflict emotional harm on others. In other cases, persons other than those listed in the statute such as non-spousal life partners or non-familial beneficiaries – will have an equally strong, if not greater, interest in access to the records. In its failure to allow these individuals the unfettered access that will be enjoyed by others, the statute is overly broad and in violation of article I, section 24(c)

simply has exempted more records than are necessary to serve the purpose of the exemption.

Section 2 of chapter 2001-1 further observes that "the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings *would* subject the immediate family of the deceased to continuous injury," In choosing the word "would" in this sentence, the Legislature perhaps had this specific case in mind. It plainly could not have made that finding with respect to *all* immediate family members of deceased persons because in some instances, immediate family plainly might prefer that the public have the right to inspect, copy, and publish autopsy photographs. For example, when an autopsy photograph would be instrumental in persuading legislators that action should be taken to impose certain safety requirements, family members might be gratified by that use of photographs. Family members also might be gratified by inspection, copying, and publication of autopsy records that leads to the discovery of malpractice or to the uncovering of wrongdoing.[17]

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[17] In *Church of Scientology Flag Service Organization v. Office of the State Attorney of Pinellas County, Florida,* No. 00-4353-C1-13 (Fla. 6th Cir. July 5, 2000) (writ of mandamus and order denying motion for temporary injunction), the circuit court ordered the release of autopsy photographs to the *St. Petersburg Times.* In that case, Ms. McPherson died while in the custody of the Church of Scientology. The *St. Petersburg Times* sought access to the photographs to demonstrate that the

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A further difficulty with the breadth of the new exemption is that inspection alone presents no legally significant risk that the photographs would be published. The Earnhardt family argued below that allowing inspection of photographs would create a risk of publication because of the availability of small cameras used for espionage. This argument proves too much. If one assumes that the public will violate the law to obtain copies of autopsy photos for dissemination, there is no reason to conclude that merely limiting public inspection will be effective. Employees could be bribed and photographs could be stolen whether inspection were allowed or not. The mere possibility that a precaution can be circumvented by illegal activity does not show that a less restrictive precaution (denial of copying) would not be as effective as the most restrictive precaution (denial of all access) to prevent the harm. If the harm to be avoided is publication of autopsy photographs, then the Legislature plainly had available a less restrictive means of achieving that objective than the means that it chose.

The overbreadth of the statute is not saved by the inclusion of a mechanism by which a court can order the disclosure of some autopsy photographs because the legislature has not directed that courts to require disclosure where harm would *not* be caused by inspection, copying, or publication of the photographs. Instead, the legislature has directed courts to order the release of autopsy photographs "upon a showing of good cause." The legislature has done nothing to define "good cause," other

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church had mistreated Ms. McPherson. The church, but not the McPherson family, opposed the release of the records.

than to indicate that "the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form." These criteria do nothing to ensure that a court's discretion will be confined so that it will allow inspection of materials that will not cause the harm that supposedly justifies the exemption. In fact, the statute does not require the court to release materials under any knowable circumstances. Instead, this part of the statute simply transfers legislative powers to the judiciary and recommends factors for the judiciary to consider in making ad hoc determinations of whether ad hoc access will be allowed to particular records.[18]

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[18] This creates yet another constitutional defect in Chapter 2001-1. The Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law. *See Sims v. State,* 754 So. 2d 657 (Fla. 2000); *B.H. v. State,* 645 So. 2d 987, 991-92 (Fla. 1994); *Askew v. Cross Key Waterways,* 372 So. 2d 913, 924 (Fla 1979); *State v. Atl. Coast Line R.R.,* 56 Fla. 617, 47 So. 969 (1908). The Legislature may "enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials" to administer the law, but only "within definite valid limitations" to allow "operation and enforcement of the law within its expressed general purpose." *Atlantic Coast Line Railroad Co.,* 56 Fla. at 636-37, 47 So. at 976. Chapter 2001-1 does not provide sufficiently definite, valid limitations to allow for the complete operation and enforcement of the exemption. Instead, the legislature has left the courts to determine what constitute "good cause" for the disclosure of the autopsy records at issue and, to the extent that the legislature has provided guidance with respect to that determination, it has done so on the basis of criteria that are impermissibly based on the past or future expression of the requester. The Florida Supreme Court held a

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This type of legislation offends article I, section 24(c) in much the same fashion that the defendants' request for a narrowing construction of the exemption in the *Halifax* case offended article I, section 24(c). "[I]n enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose." *Halifax Hospital Medical Center,* 724 So. 2d at 570. By allowing the judiciary to decide which autopsy records will be exempt, the Legislature has failed to exercise its constitutional duty.

II.

Campus Communications Should Have Been Granted Access Under Chapter 2001-1

In the event that the Court upholds the constitutionality of chapter 2001-1, it then should consider whether the circuit court erred in holding that Campus Communications had not shown good cause under chapter 2001-1 to inspect and copy the photographs. The Court's ruling is based on findings that are not supported by substantial

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similarly imprecise statute regulating speech to be an invalid delegation of legislative authority in *Brown v. State,* 358 So. 2d 16, 20 (Fla. 1978). The statute in that case made it a misdemeanor to use "profane, vulgar and indecent" language in any public place or private premises within the hearing of others. By leaving to the courts the task of giving meaning to these imprecise terms, the legislature had improperly delegated its legislative authority. "The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary." *Id.* at 20.

competent evidence and legal conclusions that are incorrect.

Chapter 2001-1 first suggests that a trial judge should consider whether access to the records is necessary for public evaluation of governmental performance. The circuit court erred as a matter of law interpreting this criterion as narrowly as it did. Access to autopsy reports, including photographs, has been regarded as necessary for such evaluation for many years. The Legislature first enacted the Public Records Law in 1909. 1909 Laws of Florida, chapter 5942, sec. 1. The statute stated: "All state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida," No exemption was made for autopsy reports. The law has been amended innumerable times since 1909, but until this year, there was no general exemption for autopsy reports[19]

[19] The Legislature did exempt the autopsy reports of eight county medical examiners in the 1950s and 1960s. See Ch. 27439, 1951, Laws of Florida (Broward County); Chapter 59-1242, Laws of Florida (Duval County); s. 10, Ch. 63-1142, Laws of Florida, (confidentiality of records of Brevard County medical examiner); s. 9, Ch. 59-1381, Laws of Florida, (confidentiality of records of Indian River County medical examiner); s. 12, Ch. 67-1704, Laws of Florida, (Martin County); s. 9, Ch. 1063, 1955 (Orange County); s. 5, Ch. 61-2640, Laws of Florida, (Palm Beach County); s. 9, Ch. 31270, 1955, Laws of Florida (Sarasota County). But in 1970, the Legislature enacted s. 11, Ch. 70-232, Laws of Florida (codified as chapter 406, Florida Statutes), to govern medical examiners generally and it superseded these special acts without including any exemptions for records created by medical examiners. In an informal opinion on August 21, 1974, the Attorney General concluded that autopsy reports are open to public inspection and copying. The Attorney General reiterated this conclusion two years later in a formal opinion, Opinion 76-156. In 1984, a circuit court held that chapter 406 repealed all special laws exempting autopsy records from the inspection and copying requirements of chapter 119, *Palm Beach*

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and for good reason. Access to autopsy reports helped to ensure that the medical examiner did his job correctly and inspired public confidence in conclusions reached by the medical examiner. Both are important objectives because the medical examiner is in many ways the public's first line of defense against criminal activity, product liability, and disease. That official is required to determine the cause of a death that occurs by crime or accident or under any unusual circumstances.[20] The ability to review the medical examiner's work is therefore vital to the public and the press.[21] Closing objective records such as photographs to the public, substantially interferes with the

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Newspapers. Inc. v. Terlizesse, 6 Fla. Supp. 2d 8, 10 (15th Cir. 1984), and ordered production of the autopsy report prepared by the Palm Beach County Medical Examiner in connection with the death of David Kennedy, the son of the late Senator Robert F. Kennedy. The Fourth District Court of Appeal upheld this ruling in *Bludworth v. Palm Beach Newspapers, Inc.,* 476 So. 2d 775 (Fla. 4th DCA 1985).

[20] Autopsies are authorized by the Medical Examiner by section 406.11, Florida Statutes, when any person dies in the state of criminal violence, by accident, by suicide, suddenly, when in apparent good health, unattended by a practicing physician, in prison or a penal institution, in police custody, in any suspicious or unusual circumstance, by criminal abortion, by poison, by disease constituting a threat to public health, by disease, injury, or toxic agent resulting from employment; when a dead body is brought into the state without proper medical certification; or when a body is to be cremated, dissected, or buried at sea.

[21] Reporters regularly have exercised that right to investigate and to report about criminal activities, accidental deaths and other important matters. *See* Carl Hiaasen, *Banning Autopsy Photos is Dangerous,* The Miami Herald (Mar. 11, 2001) ("Many times, deaths that initially were ruled accidents or suicides have later been revealed as homicides. These crimes were uncovered because someone took a fresh look at the case. It might have been a family member or a friend, an insurance investigator or even a journalist.").

public's ability to evaluate the medical examiner's work. It is left solely with the subjective autopsy report and no ability to evaluate its accuracy.

The circuit court acknowledged that access to the records also might help to evaluate NASCAR's safety requirements, but deemed this to be a "private" matter, not involving governmental performance. NASCAR conducts races, however, only with the approval of the government. The Legislature certainly has the power to stop races that regularly result in the deaths of drivers or to condition their continuance on the organizer taking certain safety precautions. The photographs that were sought in this case could help to confirm that Dale Earnhardt's death could have been prevented had certain safety equipment been required by NASCAR. That might lead to legislation to make racing safer.[22]

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[22] Significantly, the Legislature already has adopted laws that are designed to protect race organizers from liability suits arising from the deaths of drivers. *See* Fla. Stat. § 549.09(2) (2001) which provides "[a]ny person who operates a closed-course motorsport facility may require, as a condition of admission to any nonspectator part of such facility, the signing of a liability release form. The persons or entities owning, leasing, or operating the facility or sponsoring or sanctioning the motorsport event shall not be liable to a nonspectator or her or his heirs, representative, or assigns for negligence which proximately causes injury or property damage to the nonspectator area during the period of time covered by the release." Section 540.09(2), Florida Statutes. Without such legislation, race organizers could be sued for ordinary negligence. *See, e.g., Ashcroft v. Calder Race Course, Inc.,* 492 So. 2d 1309 (Fla. 1986). Although the doctrine of "assumption of the risk" tempered the impact of the negligence doctrine in this area, *see, e.g., Gulf Stream Park Racing Ass'n v. Miller,* 119 So. 2d 749 (Fla. 2d DCA 1960), it did not foreclose the possibility of a lawsuit for negligence being filed. In other states, the liability of racetrack owners and race

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The intrusion into the family's right to privacy by inspection and copying of the records cannot be found to invade the family's privacy rights at all because the family would not even be aware of the inspection or copying. The misuse of autopsy photographs *after* they have been inspected and copied can, of course, be tortious. In *Williams v. City of Minneola,* 575 So. 2d 683 (Fla. 5th DCA 1991), this Court reviewed a claim that police officers had violated the rights of the mother and sister of a 14-year-old boy who had died of a drug overdose by gratuitously showing the videotape of the boy's autopsy and by gratuitously displaying autopsy photos in a party atmosphere where the audience was joking and laughing. The Court held that this behavior – not the inspection or copying of the records – could constitute intentional infliction of emotional distress.[23] "One who behaves outrageously with

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promoters and sponsors such as NASCAR has been established in a wide variety of circumstances. *See, e.g., Wolfgang v. Mid-America Motorsports, Inc.,* 111 F.3d 1515 (10th Cir. 1997) (affirming jury verdict for plaintiff in action arising from severe injuries to driver where promoter recklessly disregarded safety risk); *Owen v. R.J.S. Safety Equipment, Inc.,* 591 N.E.2d 1184 (N.Y. 1992) (rejecting assumption of risk defense where spouse of deceased race car driver demonstrated that driver subjected to dangerous conditions above usual dangers inherent in auto racing); *Arnold v. Shawano County,* 317 N.W.2d 161 (Wis. App. 1982) (summary judgment for owner and operator of track reversed); *McCarthy v. NASCAR,* 226 A.2d 713 (N.J. 1967); *Midkiff v. NASCAR,* 82 S.E.2d 417 (N.C. 1954); *see generally* Andrea G. Nadel, Annotation, *Liability for Injury or Death of Participant in Automobile or Horse Race at Public Track,* 13 A.L.R. 4th 623 (1982).

[23] The Court also held that the conduct of the defendants could not constitute a common law invasion of the plaintiffs' privacy. The Court found "two basic problems" with the common law invasion of privacy theory. "First, the publicity given to private facts must be to the public at large or to so many persons that the matter must be regarded as substantially certain to become public knowledge." *Williams,* 575 So. 2d

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regard to pictures of a dead body can be presumed to know that severe emotional distress will be inflicted thereby on those who were closely related to the deceased, should those survivors become aware of the tortfeasor's behavior," the court held. *Id.* at 693. Similar conclusions have been reached in other cases.[24] No case, however, has held that the mere inspection and copying of autopsy records is an invasion of a family's privacy rights.

Another factor that the circuit court should have considered in weighing the request for access was that Earnhardt invited intense public scrutiny of every aspect of his life through his decision to engage in a sport that is extremely dangerous, that regularly results in the deaths of drivers, that attracts millions of fans and television viewers, and that makes millions of dollars for race organizers, participants and sponsors. A family that has invited so much public attention and that has benefited financially and otherwise by such extensive public attention cannot have the same expectation of privacy as individuals who have not engaged in such activities.[25]

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at 689. "Second, an invasion of privacy action of the category here involved can be brought only by a living person whose own privacy is invaded." *Id.*

[24] *See, e.g., Armstrong v. H&C Communications, Inc.*, 575 So. 2d 280 (Fla. 5th DCA 1991) (holding that television stations could be held liable for intentional infliction of emotional distress arising from the broadcasting of videotape of skull of a child shown by medical examiner).

[25] *See generally Bartnicki v. Vopper*, 121 S. Ct. 1753, 1765 (2001) ("One of the costs associated with participation in public affairs is an attendant loss of privacy").

The circuit court should have concluded that allowing inspection and copying of the photographs is the least intrusive means available to satisfy the request for access because less intrusive means, such as the limited access allowed to a court-appointed expert, cannot quell the controversy surrounding Earnhardt's death. The availability of a written autopsy record cannot suffice because it plainly does not contain all of the same information available from photographs. Moreover, even if the photographs showed nothing more than the autopsy report, access to the photographs still would be necessary to confirm this. As shown in the record, autopsy reports often are not accurate and inspection of photographs can demonstrate this.[26]

The circuit court erred as a matter of law in holding that Campus Communications had not shown good cause for seeking inspection and copying of the photographs at issue.

III.

Judgment Should Have Been Entered Against the Earnhardts' Disclosural Privacy Claim

If Chapter 2001-1 is held to be unconstitutional or if the Court holds that Campus Communications was entitled to access under Chapter 2001-1, the Court then should consider the Earnhardt's assertion that they have a

[26] At a minimum, the Court should reverse the trial court's denial of the motion for new trial that was based on the trial court's exclusion of news articles showing the relevance of the photographs to an important public controversy.

constitutional right that supersedes that statutory right of access. The circuit court explicitly ruled against the Earnhardts on this claim in its oral ruling and then in favor of the Earnhardts in its written judgment. Because of the circuit court's vacillation on this issue, it ought not afford any deference to the circuit court. The issue, in any event, is a pure issue of law that may be considered de novo.

The Earnhardts contended below that even if Florida law required the medical examiner to allow public access to the photographs, that they were entitled to enjoin release of the photographs on the basis of rights guarantied them by (A) article I, section 23, Florida Constitution; and (B) the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution. Neither of these arguments has merit.

A. The State Constitutional Privacy Right Does Not Limit the Public Records Law

The plaintiffs first cite article I, section 23 of the Florida Constitution as authorizing the relief that they request. Article I, section 23, which amended the Constitution on November 4, 1980, provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise construed herein. *This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.*" (Emphasis added). The second sentence of the section "was added to prohibit use of the privacy amendment to impede public

access to public information"[27] "The legislature designed the amendment to control the collection of information rather than disclosure"[28] Thus, "[a]lthough legislative revision of [the Sunshine and Public Records Law] remains possible, the courts are precluded from invalidating or creating exceptions to these laws on the basis of" article I, section 23.[29] In one of the early tests of article I, section 23, *Mills v. Doyle,* 407 So. 2d 348 (Fla. 4th DCA 1981), the Fourth District Court of Appeal adhered to this view. "[B]y its terms," the Court held, "Article I, Section 23, does not limit the public right of access to public records. Therefore, adoption of Article I, Section 23, has no adverse effect on Chapter 119, Florida Statutes." The Florida Supreme Court has repeatedly adhered to this view.[30] Therefore, it is

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[27] R. D. Woodson & Ricki L. Tanner, *Federal Constitutional Privacy & The Florida Public Records Law: Resolving the Conflict,* 33 U. Fla. L. Rev. 313, 337 (1980) (footnotes omitted) (citing Public Administration Clearing Service, *Proposed Amendments to Florida Constitution to be on Ballot on October 7, 1980, & on November 4, 1980 Elections* 17 (1980)).

[28] *Id.* at 337 (footnotes omitted).

[29] Joseph S. Jackson, *Interpreting Florida's New Constitutional Right of Privacy,* 33 U. Fla. L. Rev. 565, 580 (1981); *see also* Gerald B. Cope, *A Quick Look at Florida's New Right of Privacy,* 55 Fla. Bar J. 12, 12-13 (1980).

[30] *See Post-Newsweek Stations, Fla., Inc. v. Doe*, 612 So. 2d 549, 552 (Fla. 1992) (article I, section 23 "has not been interpreted to protect names and addresses contained in public records"); *Michel v. Douglas*, 464 So. 2d 545 (Fla. 1985) (article I, section 23 could not be invoked by employees of public hospital to block access to hospital personnel records that were public records); *Forsberg v. Hous. Auth. of City of Miami*, 455 So. 2d 373 (Fla. 1984) (public housing tenants had no right to enjoin release of information provided by them to public housing authority); *see also Borges v. City of West Palm Beach*, 858 F. Supp. 174, 178 (S.D. Fla. 1994) (recognizing that the Florida Supreme Court has

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very clear that article I, section 23 provides no authority whatsoever for the Earnhardts' request for an injunction.

B. There is No Federal Constitutional Privacy Right that Limits the Public Records Law

The Earnhardts also claimed below that they had a federal constitutional right to block public and press inspection of the photographs. They claimed that "right" emanated from a trio of United States Supreme Court decisions,[31] yet the Florida Supreme Court has held that these cases do not create the claimed federal right. When it first considered the assertion of such a right in *Shevin v. Byron, Harless, Schaffer & Associates,* 379 So. 2d 633 (Fla. 1980), in an attempt to block press access to a consultant's files regarding applicants for a position with a municipal utility, the Court held: "The Supreme Court may some day breathe life into the privacy interest asserted by respondents, but, until that occurs, we conclude that there does not exist, under the facts of this case, a constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers." *Id.* at 638.

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found that article I, section 23 cannot be construed to limit the Public Records Law).

[31] *Paul v. Davis,* 424 U.S. 693 (1976) (rejecting claim that city and county officials violated plaintiffs right of privacy by distributing flyers identifying plaintiff as an active shop lifter); *Whalen v. Roe,* 429 U.S. 589 (1977) (rejecting a claim that disclosural privacy rights would be violated by a centralized computer filing system for medical records maintained by government agency); *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425 (1977) (rejecting a claim that archivists' review of tapes made during Nixon presidency to sort out personal matter would violate Nixon's right of privacy).

The Florida Supreme Court subsequently rejected assertions of the supposed federal "right" in a variety of circumstances and in each case it has concluded that no such federal right exists to block access to public records.[32] The Supreme Court's antipathy for the assertion of the "right" to attempt to block or even slow access to public records was made clear in *Cannella.* There, the Court evaluated the constitutionality of a City of Tampa policy that required the delay of the release of police personnel files for three days pending notice to the affected employee. After the trial court upheld the policy, an en banc decision of the Second District Court of Appeal held, 5 to 4, that "government employee personnel files could be automatically withheld for 48 hours, to allow employees an opportunity to raise any claims that the information should be withheld permanently because of privacy interests." 458 So. 2d at 1076-77.

In the Florida Supreme Court, the City and the police officers argued that this decision should be upheld because "an automatic delay is necessary to allow the officers to be present during the inspection of their records, and to allow them to raise any constitutional claim that the records should not be opened for inspection." *Id.* at 1076.

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[32] *See Michel,* 464 So. 2d 545 (employees of public hospital had no federal constitutional right to stop access to hospital personnel records that were public records); *Tribune Co. v. Cannella,* 458 So. 2d 1075 (Fla. 1984) (police officers had no constitutional privacy right to delay production of their personnel files); *Forsberg,* 455 So. 2d 373 (public housing tenants had no right to enjoin release of information provided by them to public housing authority).

A unanimous Supreme Court rejected these arguments, first observing that it previously had held in *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979), that "the only justification for withholding a record or a portion thereof is the custodian's assertion of a statutory exemption." *Id.* at 1076. The Court then observed that to agree with the City or the police officers "would cause us to write into the statute something that is not there, and this we decline to do." *Id.* "Delaying inspection to allow an employee to be present during the inspection is not within the legislative scheme. . . . The employee's presence could serve no legally cognizable purpose, and any delay to allow such presence is therefore inconsistent with the Act, which contemplates only the reasonable custodial delay necessary to retrieve a record and review and excise exempt material." *Id.*

"As to the argument that an automatic delay is necessary to allow an employee time to raise a constitutional challenge," the Court held, "we can only say that the time when the record is requested is not the time to raise such a challenge. . . . The legislature has placed the books on the table; only it has the power to alter that situation." *Id.* at 1078-79.

In *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), the Florida Supreme Court explicitly "found no state or federal disclosural privacy right to exist."

In the specific context of autopsy photographs and videotapes, this Court has reviewed these directions from the Florida Supreme Court and has held in *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), that "neither a custodian of records nor a person who is the subject of a record can claim a constitutional right of

privacy as a bar to requested inspection of a public record in the hands of a government agency."

That the federal disclosural privacy right does not give individuals a right to enjoin the release of public records even though persons who obtain the records might use them to inflict emotional harm should not be surprising because recognition of such a right could result in a torrent of claims against the government and would be extremely difficult to define. Would such a right entitle one to enjoin one agency from releasing to other agencies? Would such a right entitle one to enjoin the government from releasing the information to anyone other than one who could demonstrate good cause for seeking the information? Would tort law principles govern the extent of the right so that one might be able to enjoin the government from releasing information in a manner that would constitute intentional infliction of emotional distress under state tort law, but not other information? And, if that were the case, wouldn't the injunction sought have to be granted or denied on the basis of the likelihood that the individual seeking the records would disseminate the information in such a fashion that the dissemination would result in the intentional infliction of emotional distress? Would allowing inspection of records by a reporter whose news organization had a policy against publishing autopsy photos or even supplying copies to such a reporter who is investigating a crime or an accident not rise to the level of a constitutional violation, while release to other publishers would rise to that level? Could the right to an injunction be determined by the content of the requester's publication and, if so, would not such a determination violate the First Amendment rights of the requester? And, how would the right to disclosural privacy advocated by the plaintiffs in

this case be meaningfully protected? Would they be entitled to each request for a record? Would production of records have to be delayed to allow the assertion of the putative right? If not, would individuals have a right to seek damages against the government for releasing information that third parties used to inflict emotional distress against them?

These are just some of the difficulties that would be created by recognizing a federal disclosural privacy right such as that advocated by the Earnhardts in this case. In light of these practical problems as well as the decisions of the Florida Supreme Court declining to recognize a federal disclosural privacy right, this Court must reverse that aspect of the circuit court judgment granting a permanent injunction against the release of the records. It is plain from the transcript of the proceedings that the trial judge himself concluded that he should not enter the injunction requested by the plaintiffs. Yet, the Earnhardts' lawyers gave him a proposed final judgment that induced him to depart from his own oral ruling. That error should be reversed.

Access to public records in the hands of public officials such as the medical examiner is regulated entirely by statute and no constitutional right exists to overcome that statutory scheme.[33] "Florida's definition of a public record

[33] Access to judicial records, by contrast, are not governed by statute, but by common law principles that allow a balancing of interests. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So. 2d 113 (Fla. 1988) (setting forth factors to be considered before closing civil proceedings); *Miami Herald Publ'g Co. v. Lewis*, 426 So. 2d 1 (Fla. 1982) (setting forth test for closure of criminal proceedings); *State v. Rolling*, No. 91-382 CF A, 1994 WL 722891 (Fla. 8th Cir. July 27, 1994)

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allows access by anyone, and permits exemptions only by legislative amendment. The state courts have refused to establish exemptions in light of the statute, and have not determined that disclosural privacy is a legitimate constitutional right which would override the state interest."[34]

CONCLUSION

The lawsuit filed by Teresa Earnhardt and joined by some of her family members and Dale Earnhardt, Inc. should have been dismissed. An order also should have been entered on Campus Communications' cross claim requiring the defendant medical examiner to make the records that are the subject of this lawsuit available for inspection and copying. In the event that any person or entity that inspects or copies the records uses the records in a manner that is tortious under Florida law, the Earnhardts or any others injured by such uses may pursue

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(allowing inspection but not copying of exhibits introduced in criminal case). The records at issue here were not a part of any judicial proceeding prior to the plaintiffs' commencement of this lawsuit, therefore these decisions have no application here.

[34] Woodson & Tannen, *supra* at 334. Even if this Court were to conclude that a federal disclosural right of privacy does exist and that it requires the Court to balance the interests in public access against the interests in privacy, *see, e.g., Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978) (balancing interests), it should hold that the balance weighs in favor of allowing access, *See* Point II *supra*.

claims for any damages that they suffer and for punitive damages to deter such conduct in the future.

Respectfully submitted,

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I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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R. App. 58

IN THE
SUPREME COURT OF FLORIDA

Case No. SC02-1635
Lower Tribunal No. 5D01-2419

CAMPUS COMMUNICATIONS, INC.,
a Florida corporation, Petitioner,

vs.

TERESA EARNHARDT, THE ESTATE OF DALE EARNHARDT, DALE EARNHARDT, JR., TAYLOR EARNHARDT, DALE EARNHARDT, INCORPORATED, COUNTY OF VOLUSIA, OFFICE OF THE MEDICAL EXAMINER, THE STATE OF FLORIDA, and MICHAEL URIBE, Respondents.

On Notice Invoking the Court's Discretionary Jurisdiction to Review Questions Certified to be of Great Public Importance by the Fifth District Court of Appeal

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Petitioner's Initial Brief

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EXPLANATION OF REFERENCES

Citations in this brief are to the record compiled in tale circuit court and filed in the Fifth District Court of Appeal. The notation ("R. ___-___ Ex. or ¶ ___") refers to the volume number – page number, and then, when appropriate, to exhibits or paragraphs of the referenced document. The transcript of the trial below are volumes 17 through 21 of the record. The record is consecutively numbered through the first 16 volumes and then numbering begins again in volume 17.

INTRODUCTION

The Fifth District Court of Appeal's decision below affirmed the trial court's judgment denying the petitioner, Campus Communications, Inc., publisher of *The Independent Florida Alligator,* access to public records on the basis of a sweeping Public Records Law exemption rushed through the Florida Legislature specifically to prevent access to both the requested records – the autopsy photographs of Dale Earnhardt – and to bar access to *all other* autopsy photographs held by medical examiners throughout the State of Florida. The exemption is so broad that it includes not only photographs of recently deceased individuals who have living relatives, but also photographs of individuals who have been deceased for decades and who have no living relatives. Autopsy photographs historically had been open and available for inspection and copying and frequently had been used by journalists, researchers, and others to find and report information important to human safety – including in some instances information showing that an autopsy *report* did, not correctly reflect the cause of death. Few ever used that valuable openness

to cause unjustifiable harm. When they did, tort law compensated the injured and punished the wrongdoers.

The new exemption at issue here, chapter 2001-1, Laws of Florida, codified as section 406.135, Florida Statutes (2001), destroyed that historical balance and violated the constitutional mandate of article I. section 24(c) of the Florida Constitution, that a new public record exemption cannot be created unless a public necessity for the exemption is stated with specificity and the exemption is no broader than necessary to accomplish the stated purpose of the law. This Court first applied this standard in *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999), invalidating an exemption that, as here, applied both to records that would serve the purpose of the exemption (allowing public hospitals to compete fairly with private hospitals), and those that would not. The inclusion of the latter rendered the entire exemption void and required release of the records at issue even though the release of the records at issue defeated the legislative purpose in its entirety and made competition for public hospitals difficult. That decision required the Legislature to go back to the drawing board and to craft an appropriately narrow exemption.

The Fifth District Court of Appeal did not make any attempt to distinguish the overbreadth of the exemption at issue in *Halifax* from the overbreadth of the exemption at issue here. Instead, it found the exemption here for *all* autopsy photographs to be analogous to the narrow exemption at issue in *Bryan v. State,* 753 So. 2d 1244 (Fla. 2000), for Department of Corrections information "'which if released *would jeopardize* a person's safety.'" *Id.* (quoting Fla. Stat. § 945.10(1)(e) (1999)) (emphasis added). The exemption here could not be more different than the

exemption in *Bryan* because the exemption here is not limited to those photographs which if released *would cause harm,* but rather sweeps within it all photographs including those that plainly would do no harm if released. The Fifth District's decision should be reversed on that basis. Alternatively, the decision should be reversed because the Legislature may not destroy substantive vested rights through retroactive legislation. Once a record has been requested, the right to the record is an immediate, fixed right of present enjoyment. To hold otherwise would destroy the operation of the Public Records Law.

Even, however, if the constitutionality of the exemption is upheld, the Court should vacate the Fifth District's decision because Campus Communications demonstrated good cause under an exception to the exemption created by section 406.135, Florida Statutes (2001), for obtaining access to the records.

Finally, neither the Florida nor the United States Constitution guaranty anyone the right to stop a public official from complying with the Public Records Law, as was contended by some of the respondents.

STATEMENT OF THE CASE AND THE FACTS

Dale Earnhardt died in a crash in the final lap of the Daytona 500 on Sunday, February 18, 2001. (R.9-1670-1696 ¶ 75). In accordance with chapter 406, Florida Statutes, an agent of the medical examiner of the Seventh District in and for Volusia County, Florida, conducted an autopsy on Earnhardt on Monday, February 19, 2001. (R.9-1670-1696 ¶ 92).

Teresa Earnhardt commenced this action on Thursday, February 22, 2001, seeking a temporary and permanent injunction to stop Thomas Beaver, the medical examiner for Volusia County, Florida, from making photographs of the autopsy available to the public and the press. (R.2-290-301). The Court entered an ex parte temporary injunction on the date that the lawsuit was filed. (R.2-302-04).

After the *Orlando Sentinel* appeared in the action on March 2, 2001, to oppose sealing of the records (R.2-315-17, 3-550-56), and other members of the Earnhardt family and Dale Earnhardt, Inc. appeared to support sealing the records (R.2-347-49), the Court referred the matter to mediation. (R.4-750-51).

As the mediation was coming to a conclusion on March 16, 2001, Campus Communications, Inc., publisher of *The Independent Florida Alligator,* a newspaper in Gainesville, Florida, submitted a motion to intervene to seek dissolution of the temporary injunction and dismissal of or summary judgment against the complaint. The motion alleged that Campus Communications had asked that it be allowed to inspect and copy the autopsy photographs and that the medical examiner had not complied with the request. (R.5-771-803). Campus Communications had not participated in the mediation.

On that same day, March 16, 2001, the parties who had participated in the settlement – the *Sentinel,* additional intervening members of the press (R.4-755-58), the medical examiner, and the Earnhardts – announced that *they* had reached an agreement whereby the mediator would appoint an independent expert to review the photographs and audiotapes and would report his findings.

(R.5-766-69). The agreement further provided that after the appointed expert examined the materials at issue they would be permanently sealed. (R.5-766-69).

The circuit court approved the settlement on March 19, 2001. (R.5-770).

Ten days later, on March 29, 2001, the Florida Legislature amended the Public Records Law through Chapter 2001-1, Laws of Florida, to create an exemption to the Public Records Law for autopsy photographs.

On April 3, 2001, Campus Communications filed supplemental materials in support of its motion to intervene showing that autopsy photographs historically have played a critical role in press reports about murders, medical malpractice, prison deaths and numerous other public controversies. (R.7-1163-1311). In some instances, the press had found that medical examiners themselves had made serious errors in determining the cause of death or have themselves engaged in wrongdoing or questionable practices. (R.7-1163-1311 Exs. 5-7, 9-10, 13, 15-17, 19, 22-51). The supplemental materials also demonstrated that the cause of Earnhardt's death had become a public controversy and that the photographs sought were relevant to that controversy. (R.7-1163-11 Exs. 2, 4 & 8).

On April 5, 2001, the circuit court granted Campus Communications' motion to intervene. (R.7-1334). On April 16, 2001, Campus Communications filed a cross-claim against the medical examiner seeking an order under the Public Records Law requiring him to allow inspection and copying of the Earnhardt autopsy photographs. (R.8-1359-75). The claim asserted that Chapter 2001-1 could not be applied retroactively to this case and, in any event, that

the exemption was broader than necessary to serve the purpose for which it had been enacted.

The State of Florida intervened to defend the constitutionality of Chapter 2001-1. (R.8-1376-79).

The medical examiner answered Campus Communications' complaint on May 2, 2001, admitting that the records sought by Campus Communications were public records and that they were not exempt from the disclosure requirements of that law at the time that they had been requested, but asserting that he had been prevented from allowing access to the records by the temporary injunction that had been entered by the circuit court. (R.8-1415-17).

The State answered the complaint on May 9, 2001, asserting that the Chapter 2001-1 was constitutional. (R.8-1452-54). The State took no position regarding the constitutionality of the Public Records Law prior to its amendment even though the Earnhardts contended in their complaint that the law invaded their state and federal constitutional rights.

During the first day of the bench trial on June 11, 2001, the Court heard testimony from Thomas Beaver, the Volusia County medical examiner. He testified that "it's important that we, as a society, know why people die, because . . . it helps us to identify risks to the society as a whole." (R.18-200). He testified that historically his office had treated autopsy reports, including autopsy photographs, as public records and had released the reports and photographs upon the request of any member of the public for inspection and copying. (R.18-202 & R.9-1670-96 ¶ 35).

He testified that he did not follow that practice in this case because of the temporary injunction entered by the circuit court. (R.18-223).

In admissions filed with the court, Dr. Beaver also testified that as medical examiner for the Seventh District, he is responsible for investigating all deaths resulting from homicide, accidents or in sudden unexpected circumstances, that he oversees about 650 autopsies annually, and that his office has a staff of approximately 11 and an annual budget of approximately $1.1 million. (R.9-1670-96 ¶¶ 27, 28 & 32).

Prior to this lawsuit, when a member of the public had asked to inspect or copy the autopsy records relating to a specific deceased person, that member of the public would be allowed to inspect and copy all autopsy records relating to the deceased person, including autopsy photographs, videotapes, and audiotapes. (R.9-1670-96 ¶ 38). More than 50 members of the public had inspected and copied autopsy records maintained by Beaver within the 12-month period preceding February 22, 2001. (R.9-1670-96 ¶¶ 39 & 40). Beaver did not have a policy of requiring notification of relatives of a deceased person before allowing such access (R.9-1670-96 ¶ 41) and rarely was such notification given. (R.9-1670-96 ¶ 42).

Prior to this litigation, individuals who had copied autopsy photographs had not used them for harmful purposes (R.9-1670-96 ¶ 43) and no one had ever asked Beaver to deny members of the public the opportunity to inspect or copy autopsy photographs, videotapes, or audiotapes of a deceased person. (R.9-1670-96 ¶ 44).

Individuals who previously had asked for and obtained access to autopsy photographs included reporters,

privately-employed medical doctors, privately-employed pathologists, privately-employed investigators, educators, medical researchers, sociologists, and acquaintances and relatives of the deceased (R.9-1670-96 ¶ 45) and these individuals sometimes expressed disagreement with the conclusions of the medical examiner regarding the cause of death after they reviewed the photographs. (R.9-1670-96 ¶ 48). Beaver himself had worked as a consultant in civil and criminal litigation and found it essential to review any autopsy photographs for that purpose. "[T]he first thing I ask the attorney for are the pictures," he testified. (R.18-235).

Medical examiners are not the only public officials who take photographs of deceased persons, according to Beaver. Photographs of the deceased are also taken by law enforcement officials in some cases (R.9-1670-96 ¶ 53), although that was not done in the instant case. Those photographs are not kept in the custody of the medical examiner, they are kept by law enforcement agencies. (R.9-1670-96 ¶ 54).

Medical examiners also sometimes take photographs of deceased persons other than autopsy photographs. For example, they take photographs at the scene of an accident or before an autopsy is commenced. (R.9-1670-96 ¶ 55, 56 & 58). Such photographs are not autopsy photographs. (R.9-1670-96 ¶ 59).

Autopsy photographs historically have been used for a wide variety of purposes. Beaver himself has given lectures on autopsies or autopsy investigations (R.9-1670-96 ¶ 64) and he has displayed photographs of autopsies for educational or training purposes to law enforcement

officials, medical students, physicians, forensic pathologists, paramedics, and nurses. (R.9-1670-96 ¶ 65). He also has shown autopsy photographs to other medical examiners or pathologists for the purpose of seeking a second opinion (R.9-1670-96 ¶ 66) and to consultants for the purpose of seeking an expert opinion. (R.9-1670-96 ¶ 67).

In addition to providing the Court with background regarding the historical treatment and use of autopsy photographs, Beaver also explained the events leading up to this litigation. In his admissions, he acknowledged that in the week before Earnhardt died, the *Orlando Sentinel* had published a series of investigative news reports that were highly critical of the National Association for Stock Car Auto Racing, Inc. ("NASCAR"), sponsor of the Daytona 500, for failing to require head and neck restraint systems that could prevent basilar skull injuries in high speed crashes. The articles pointed out that three NASCAR drivers had died in NASCAR races in the previous nine months of head and neck injuries. The articles reported that other racing organizations had required the use of head and neck restraint systems to prevent such injuries.[1]

Immediately after Earnhardt's death on February 18, 2001, Dr. Steve Bohannon, director of emergency medical services for the International Speedway Corporation, reported to the press that Earnhardt had died of a basilar

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[1] Specifically, on February 11, 2001, the *Orlando Sentinel* published an article entitled "NASCAR idles while drivers die." (R.9-1670-96 ¶¶ 68 & 69 and attachments). On February 13, 2001, the *Orlando Sentinel* published an article entitled "Safety slow to arrive despite race carnage." The same day, the *Orlando Sentinel* published an article entitled "NASCAR drivers want own medical staff." (R.9-1670-96 ¶ 70).

skull injury – precisely the same type of injury that had killed the three NASCAR drivers that had been the subject of the *Orlando Sentinel's* critical reports. (R.19-354). Bohannon reiterated his conclusion at a press conference the following day. (R.19-354). To confirm Bohannon's conclusions, reporters requested records from the medical examiner concerning the autopsy of Earnhardt. (R.9-1670-96 ¶ 104). They did not initially, however, request photographs of the autopsy. (R.9-1670-96 ¶ 105).

On Wednesday, February 21, 2001, Bohannon asked the medical examiner's staff to allow him to inspect the photographs of the autopsy of Dale Earnhardt. (R.9-1670-96 ¶ 117) (R.19-353, 361). The medical examiner, consistent with his prior practices, did not advise any relatives of Earnhardt of this request (R.9-1670-96 ¶ 118) and allowed Bohannon's inspection to go forward. (R.9-1670-96 ¶ 119-121). Bohannon testified he was unable to determine from his inspection of the photographs whether Earnhardt's fatal injury had been caused by inertial headwhipping that could have been stopped by a head and neck restraint, seat belt failure, or some other cause. (R.19-365).

After examining the photographs that day, Bohannon reported the results of his inspection to Mike Helton, the president of NASCAR. (R.19-366). Helton told Bohannon that Earnhardt's seatbelt had failed. (R.19-365-66).

On Thursday, February 22, 2001, Teresa Earnhardt filed this lawsuit against the medical examiner (R.9-1670-96 ¶ 127) even though no reporter had requested access to or copies of photographs of the body of Dale Earnhardt during or before the autopsy. (R.9-1670-96 ¶ 128). On the

same day that the suit was filed, without holding a hearing, the circuit court entered a temporary injunction prohibiting release of the photographs. (R.19-302-04).

On Friday, February 23, 2001, NASCAR, sponsor of the Daytona 500, held a press conference in Rockingham, North Carolina, at which they announced that Earnhardt's seat belt had failed and that they did not know why. (R.9-1670-96 ¶ 130) (R.19-369). Bohannon attended the press conference and expressed the opinion that the failure of the seat belt could have been the mechanism that caused the injury that caused Earnhardt's death. (R.19-369).

After the NASCAR press conference of February 23, 2001, reporters for the first time requested access to photographs of the Dale Earnhardt autopsy. (R.9-1670-96 ¶ 132). The autopsy photographs would show the cause of Dale Earnhardt's death. (R.9-1670-96 ¶ 137). The mediation ordered by the circuit court between the Earnhardts, the *Orlando Sentinel* and other media (not including Campus Communications) resulted in an agreement between the mediating parties (R.5-766-69) that the mediator would appoint an independent expert to examine the photographs for no more than 30 minutes and then issue a report concerning the cause of Earnhardt's death. Pursuant to the agreement, the report would be filed with the Court and the photographs then would be "totally and permanently sealed in the most secure manner possible." (R.5-768).

On or about March 26, 2001, Dr. Barry Myers reviewed the autopsy of Dale Earnhardt, including the photographs of the autopsy. (R.9-1670-1696 ¶ 138). He then issued a report on April 9, 2001, expressing his

opinions regarding the cause of Earnhardt's death. (R.7-1345-58).

The Myers' report did not, however, put an end to the controversy concerning either the cause of Earnhardt's death or whether NASCAR had tried to deflect criticism of its safety requirements by falsely claiming that Earnhardt's seat belt failed. Instead, with the photographs still under seal, the report simply fueled further debate in the national press.[2] (R.12-1941-82 Exs. 62-77 & 2395-2404).

At the conclusion of the first day of the trial, the circuit court announced that he had found "that the legislative enactment of Chapter 2001-1 was a valid and constitutional exercise of legislative authority, pursuant to Article 1, Section 24, of the Florida Constitution." (R.18-281). The trial court then invited Campus Communications to attempt to show that it had "good cause" for obtaining access to the photographs pursuant to the standards set forth in Chapter 2001-1. (R.18-281).

In response, Campus Communications offered testimony of Daytona Beach Police Department Sgt. Thomas Youngman, a police photographer (R.19-323-51), Dr. Steve

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[2] For example, on April 30, 2001, the *San Diego Union-Tribune reported:* "NASCAR disputes Earnhardt story." On May 1, 2001, the *Wisconsin State Journal* reported: "Earnhardt's son still believes seat belt broke." Also on the same day, *The Dallas Morning News* reported: "Woman's comments help Earnhardt seatbelt debate intensify." The following day, May 2, 2001, MSNBC headlined a report: "NASCAR knows the truth behind death." A day after that, May 3, 2001, *USA Today* reported: "Earnhardt Jr. confident in NASCAR's probe." Also on that day, *NASCAR Scene Plus* reported: "NASCAR's credibility is being shredded by 'Beltgate.' " (R. 12-1941-82 Exs. 62, 63, 64, 65, 66, 68 & 69).

Bohannon (R.19-352-99), and Teresa Earnhardt (R.20-406-82). Collectively, this testimony showed that the Earnhardt autopsy photographs already had been made available to Bohannon and to Myers, that access to the photographs was relevant and important to resolution of the controversy concerning Earnhardt's death and NASCAR's safety requirements, and that while Mrs. Earnhardt asserted that she would be distressed by anyone having any access to the photographs, that access would not in fact injure her or others.

Campus Communications urged the Court to consider the numerous news reports showing the controversy that existed regarding the cause of Earnhardt's death and NASCAR's assertion that Earnhardt's seat belt failure, rather than its lack of safety requirements, had caused Earnhardt's death. (R.20-478-81). The circuit court again declined to consider the news reports and excluded them from evidence. (R.20-482).

The circuit court then heard, over a relevance objection by Campus Communications (R.20-482-83), testimony from Michelle Bonnett and Beacher Orr, relatives of two NASCAR drivers who also had been killed in crashes at the Daytona International Speedway. (R.20-488-531).

After lengthy closing arguments (R.21-556-732), the trial judge orally announced a ruling that even though Campus Communications had asked for access to the photographs on March 16, 2001, and the Legislature had not created an exemption for the photographs until March 29, 2001, Campus Communications had no right of access to the photographs other than that provided under the amended law and that Campus Communications had not

shown that it was entitled to access under the amended law. (R.21-735-40).

The trial judge found that any bearing that the photographs might have on NASCAR's safety requirements was irrelevant because "that's a private matter that does not involve the Government at all." (R.21-737). He acknowledged that review of the photographs might show that the medical examiner's "office procedures . . . could be different . . . [a]nd the investigation by the Daytona Beach Police Department" might have been conducted differently but "these are incredibly thin excuses to invade the serious privacy rights of the family." (R.21-738).

The trial judge also rejected the Earnhardts' assertion that they had any state or federal constitutional right to require the sealing of the photographs. "Judgment shall be entered in favor of Campus Communication, Inc. . . . on the action pursuant to Article I, Section 23 of the Florida Constitution and the 14th Amendment to the United States Constitution. The temporary injunction shall be dissolved." (R.21-741).

Counsel for the Earnhardts then submitted a proposed final judgment that, contrary to the circuit court's oral ruling, not only dismissed Campus Communications' complaint seeking access to the records, but also entered a permanent injunction sealing the records. Campus Communications objected to the proposed final judgment. (R.15-2432-68). The trial judge nevertheless entered the judgment in the form submitted by the Earnhardts' counsel (R.15-2469-81), contradicting his own oral ruling.

Campus Communications moved for a new trial based on the trial judge's exclusion of news reports showing that

the records sought were relevant to an important public controversy[3] (R.15-2486-91). The trial judge denied that emotion. (R.15-2492).

Thereafter, Campus Communications timely appealed the final judgment. (R.16-2493).

The Fifth District affirmed the trial court's decision, finding that the Legislature is free to make any exemption to the Public Records Law retroactive and that the exemption is not broader than necessary because autopsy photographs is a narrow class of records. *Campus Communications, Inc. v. Earnhardt,* 821 So. 2d 388 (Fla. 5th DCA 2002). The Fifth District also certified that the constitutionality and retroactivity of section 406.135 as questions of great public importance. This Court has jurisdiction to review the Fifth District's decision pursuant to article V, sections 3(b)(3) (decisions expressly declaring a state statute valid and expressly and directly conflicting with a decision of this Court (*Halifax*)) and 3(b)(4) (decisions certified as passing upon a question of great public importance), as well as Florida Rules of Appellate Procedure 9.030(a)(2)(A)(ii) & 9.030(a)(2)(A)(v).

SUMMARY OF ARGUMENT

Point I – Section 406.135 is Unconstitutional. Section 406.135 is unconstitutional for two reasons: (A) it violates article I, section 24(c) of the Florida Constitution because

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[3] The excluded news reports are in the record at R.5-934-61 and R.12-941-82.

it is broader than necessary to serve a specifically stated public necessity; and (B) it violates due process by retroactively destroying the right that Campus Communications had to inspect and copy the records at issue at the time that it made its request.

Point II – Campus Communications Demonstrated Good Cause. Campus Communications demonstrated good cause for access: the photographs could show that Earnhardt did not die as a consequence of the failure of his seat belt, as claimed by NASCAR, but rather from the lack of a head and neck restraint. That would be relevant to a determination of whether NASCAR interfered with law enforcement investigations of the cause of Earnhardt's death to deflect public and press criticism for its failure to require drivers to use head and neck restraints.

Point III – The Plaintiffs Have No Constitutional Right to Block Compliance with the Public Records Law. This Court has repeatedly held that there is no state or federal constitutional right that allows individuals to seek injunctions against public officials to stop them from complying with a requirement of the Public Records Law. For that reason, the trial court's oral ruling rejecting the Earnhardt's request for a permanent injunction was correct and the written final judgment granting the permanent injunction should be reversed.

ARGUMENT

I.

Section 406.135 is Unconstitutional

Section 406.135 is facially unconstitutional in two respects. This is a pure question of law that is reviewable

de novo. See Smith v. Coalition to Reduce Class Size, No. SC02-1624, 2002 WL 31051569 at *4 n.3 (Fla. 2002).

A. The Legislature Violated Article 1, Section 24 of the Florida Constitution by Enacting Section 406.135

The Florida Legislature violated article I, section 24(c) of the Florida Constitution when it adopted chapter 2001-1 in that the Legislature did not state with specificity the public necessity for the law and the law is broader than necessary to accomplish the stated purpose of the law. Article I, section 24 (c) states that to enact an exemption to the disclosure requirements of article I, section 24(a), the Legislature first must "state with specificity the public necessity justifying the exemption" and then must tailor the exemption so that it is "no broader than necessary to accomplish the stated purpose of the law."

This Court first applied this constitutional provision, in *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567, 569 (Fla. 1999). In that case, the circuit court invalidated an exemption created for "written strategic plans" of public hospitals. Circuit Judge John V. Doyle held:

> The evidence in this case thus showed and the Court finds that not all aspects of written strategic plans are critical and confidential. . . . By creating an exemption for any and all discussion of the strategic plan, the legislature has created a categorical exemption which reaches far more information than necessary to accomplish the purpose of the exemption. All discussion of strategic plans is made secret solely to protect that part of

> the discussion which pertains to critical confidential information. This is facial overbreadth.

Id. at 570 (quoting the final judgment). The defendant had asked the circuit court to narrow the exemption by defining what constitutes "written strategic plans," but the circuit court declined that request, holding that "such a finding is fundamentally legislative rather than judicial." *Id.* at 569.

The Fifth District Court of Appeal affirmed, agreeing that not all aspects of written strategic plans are critical and confidential and that it should not attempt to save the statute by a narrowing judicial construction. *Id.* The Court held the statutory exemption "overbroad on its face."

This Court agreed, holding "the statutory exemption does not meet the exacting constitutional standard of article 1, section 24(c), of specificity as to stated public necessity and limited breadth to accomplish that purpose and is therefore facially unconstitutional." *Id.*

In response to the defendant's request for a judicial narrowing of the exemption to save it, the Court acknowledged a statute should be construed so as not to conflict with the constitution, but held that "a court's discretion to adopt a narrowing construction should be exercised with restraint." *Id.* at 570. The Court held, "we find in this case that we cannot move into the legislature's province by making the factual determination that would bring this statutory exemption within constitutional boundaries. A court may not have the fact-finding machinery to enable it to authoritatively construe a statute and supply a saving construction." *Id.*

The Court observed: "In this case, we do not have before us the relevant information to define 'critical confidential information' or 'strategic plans' for which disclosure would harm the business interests of the hospital. Moreover, in enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose. Thus, the task of enacting a more limited statutory exemption appropriately belongs to the legislature in this case." *Id.*

In applying article 1, section 24(c) and the holding of the *Halifax* case to this case, this Court must first examine the articulated "public necessity" that justifies enactment of the exemption. This articulation is found in section 2 of Chapter 2001-1. It begins not with a statement of the public necessity for the exemption but rather with the conclusion that "it is a public necessity" to exempt the records covered by the exemption. That first sentence is not helpful here because it does nothing to inform the Court about the purpose of the exemption.

Section 2 next states that "photographs or video or audio recordings of an autopsy depict or describe the deceased in graphic and *often* disturbing fashion." (Emphasis added). It further states "Such photographs or video or audio recordings *may* depict or describe the deceased nude, bruised, bloodied, broken, with bullet or other wounds, cut open, dismembered, or decapitated." (Emphasis added). It then concludes that "As such, photographs or video or audio recordings of an autopsy are highly sensitive depictions or descriptions of the deceased which, if heard, viewed, copied or publicized, *could* result in trauma, sorrow, humiliation, or emotional injury to the

immediate family of the deceased, as well as injury to the memory of the deceased." Each of these sentences reflects that the Legislature regarded section 406.135 as necessary because access to the materials at issue could, in *some* circumstances, inflict emotional injury on the immediate family of the subject of those materials.

In choosing the ward "often" rather than "always," the word "may" rather than "do," and the word "could" rather than "will" or "would," the Legislature explicitly acknowledged that the viewing, copying or publicizing of photographs does not always result in trauma, sorrow, humiliation, or emotional injury.[4] The exemption therefore is overbroad on its face in the same way that the exemption in *Halifax* was overbroad on its face. The Legislature

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[4] The Legislature not only has acknowledged through its choice of words that access to autopsy photographs, videotapes, and audiotapes will not always inflict emotional harm on someone, it also has acknowledged that in some circumstances the value of unfettered access to such materials will outweigh any risk that emotional harm will be inflicted by the access. It does this by stating "a surviving spouse may view and copy a photograph or video or listen to or copy an audio recording of the deceased spouse's autopsy. If there is no surviving spouse, then the surviving parents shall have access to such records. If there is no surviving spouse or parent, then an adult child shall have access to such records." The Legislature may have included this provision because spouses, parents and children often will have a need for such records for insurance and estates purposes. That obviously would not always be the case. In some instances, an individual who is within the exemption – for example, an estranged spouse, parent, or child – might well be the one individual who is *most* likely to misuse the materials to inflict emotional harm on others. In other cases, persons other than those listed in the statute – such as non-spousal life partners or non-familial beneficiaries – will have an equally strong, if not greater, interest in access to the records. In its failure to allow these individuals the unfettered access that will be enjoyed by others, the statute is overly broad and in violation of article I, section 24(c).

simply has exempted more records than are necessary to serve the purpose of the exemption.[5]

The Fifth District rejected this argument for two reasons. First, it pointed out that section 406.135 does not apply "to other records of the autopsy such as the written autopsy report" and "the trial court found that there was no information that could be obtained from the autopsy photographs of Mr. Earnhardt that was not contained in the autopsy which was published to the parties and the public." 821 So. 2d at 394. This is flawed on several levels. The availability of the autopsy report does not, as the trial court found and the Fifth District accepted, 821 So. 2d at 393-94, provide an adequate substitute for the photographs themselves. As this Court knows from its familiarity with autopsy photographs used in criminal prosecutions,[6] such photographs frequently contain

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[5] This Court is familiar with the fact that autopsy photographs are not all alike. *See, e.g., Brooks v. State*, 26 FLW S203a (Fla. 2001) (affirming conviction after introduction of five victim autopsy photographs noting that trial courts need only exclude "unduly prejudicial or particularly inflammatory photographs before the jury").

[6] *See Carroll v. State*, 815 So. 2d 601, 621 (Fla. 2002) (affirming conviction based in part on autopsy photographs); *Floyd v. State*, 808 So. 2d 175, 183-84 (Fla. 2001) (rejecting ineffective assistance of counsel claim based on failure to challenge on appeal use of two victim autopsy photographs to convict defendant); *Mansfield v. State*, 758 So. 2d 636, 648 (Fla. 2000) (holding trial court did not abuse discretion in admitting photographs depicting mutilation of victim's genitalia where relevant to medical examiner's determination of manner of victim's death); *Larkins v. State*, 655 So. 2d 95, 98 (Fla. 1995) (affirming admission of autopsy photographs "to show the manner of death, the location of wounds, and the identity of the victim"); *Straight v. State*, 397 So. 2d 903 (Fla. 1981) (affirming conviction where gruesome photographs were admitted over defendant's objection that he would stipulate to the facts); *Young v. State*, 234 So. 2d 341 (Fla. 1970)

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unique, objective information concerning the cause of death that is not and cannot be captured in the words and sketches of an autopsy report or the testimony of a medical examiner. On the other hand, if the autopsy report and other materials that remain unsealed after passage of section 406.135 truly do convey with photographic precision *all* of the information contained in the autopsy photographs, there could be no justification for sealing the photographs in the first instance. In addition, the Fifth District's focus on whether the photographs in this case would provide additional information about Earnhardt's death that was not included in the autopsy report is irrelevant to the question before the Court: whether any autopsy photographs that are included within the exemption contain information not found in unsealed autopsy reports. The answer to that is obvious – medical examiners cannot always record everything that they see. Dr. Beaver himself admitted that individuals have expressed disagreement with the written conclusions of the medical examiner regarding the cause of death after they have reviewed autopsy photographs. (R.9-1670-96 ¶ 48).

The Fifth District also rejected Campus Communications' assertion that the exemption here is overly broad, analogizing it to the exemption at issue in *Bryan v. State*, 753 So. 2d 1244. The court noted that the exemption there had been justified by the Legislature's statement that release of the records "'would *in some cases* conflict with other existing law or would reveal information that would

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(affirming conviction based on autopsy photographs that revealed manner in which several strands of wire had been wrapped around the victim's neck).

jeopardize the safety of the guards, inmates, and others.'" 821 So. 2d at 394 (quoting *Bryan's* quotation of chapter 94-83, Laws of Florida) (emphasis supplied by Fifth District). The Fifth District reasoned that the exemption in *Bryan* "could be considered constitutionally infirm on the same grounds advanced" by Campus Communications because that exemption had been found to serve the articulated public policy only "in some cases." *Id.* at 394. That is not, in fact, what either the Legislature or this Court found. The exemption at issue in *Bryan,* section 945.10(1)(e), applied solely to public records "which if released *would jeopardize* a person's safety." (Emphasis supplied). This exemption exactly tracks the specifically articulated public policy of preventing the disclosure of information that "*would jeopardize* the safety of the guards, inmates, and others." (Emphasis supplied). Under this exemption, only that information that would cause the contemplated harm is exempt.

The Legislature's observation that "in some cases" the exemption conflicts with other existing law is not needed to support the exemption of section 945.10(1)(e). It is needed to justify other subsections of section 945.10(1), that were not at issue in *Bryan,* such as section 945.10(1)(d) which exempts "Parole Commission records which are confidential or exempt from public disclosure by law." Neither this Court nor the Legislature stated, as the Fifth District erroneously concluded, that section 945.10(1)(e) satisfied the requirements of article 1, section 24(c) because disclosure of the information protected by that exemption "'in some cases' would jeopardize an individual's safety." 821 So. 2d at 394. The Legislature was clear that in all cases the exemption would serve the purposes for which it was enacted, prevention of the

release of information that "would jeopardize a person's safety." In *Bryan,* the scope of the exemption matches exactly the scope of the articulated purpose for enacting the exemption and this Court correctly upheld that exemption on that basis.

Section 2 of chapter 2001-1 further observes that "the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings *would* subject the immediate family of the deceased to continuous injury." In choosing the word "would" in this sentence, the Legislature perhaps had this specific case in mind. It plainly could not have made that finding with respect to *all* immediate family members of deceased persons because in some instances, immediate family plainly might prefer that the public have the right to inspect, copy, and publish autopsy photographs. For example, when an autopsy photograph would be instrumental in persuading legislators that action should be taken to impose certain safety requirements, family members might be gratified by that use of photographs. Family members also might be gratified by inspection, copying, and publication of autopsy records that leads to the discovery of malpractice or to the uncovering of wrongdoing.[7]

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[7] In *Church of Scientology Flag Service Organization v. Office of the State Attorney of Pinellas County, Florida*, No. 00-4353-C1-13 (Fla. 6th Cir, July 5, 2000) (writ of mandamus and order denying motion for temporary injunction), the circuit court ordered the release of autopsy

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The Fifth District expressly acknowledged this argument, 821 So. 2d at 394 n.3, but chose to address it simply by stating that the argument has "little merit." That does not answer the fact that section 406.135 in fact seals records that no one, including immediate family members, would want sealed.

A further difficulty with the breadth of the new exemption is that inspection alone presents no legally significant risk that the photographs would be published. The Earnhardt family argued below that allowing inspection of photographs would create a risk of publication because of the availability of small cameras used for espionage. This argument proves too much. If one assumes that the public will violate the law to obtain copies of autopsy photos for dissemination, there is no reason to conclude that merely limiting public inspection will be effective. Employees could be bribed and photographs could be stolen whether inspection were allowed or not. The mere possibility that a precaution can be circumvented by illegal activity does not show that a less restrictive precaution (denial of copying) would not be as effective as the most restrictive precaution (denial of all access) to prevent the harm. If the harm to be avoided is publication of autopsy photographs, then the Legislature plainly had available a less restrictive means of achieving that objective than the means that it chose. The Fifth

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photographs to the *St. Petersburg Times*. In that case, Ms. McPherson died while in the custody of the Church of Scientology. The *St. Petersburg Times* sought access to the photographs to demonstrate that the church had mistreated Ms. McPherson. The church, but not the McPherson family, opposed the release of the records.

District also addressed this argument solely in footnote with the two-word observation that it has "little merit." 821 So. 2d at 394 n3.

The overbreadth of the statute is not saved by the inclusion of a mechanism by which a court *may* order the disclosure of some autopsy photographs. That mechanism does not require disclosure where harm would *not* be caused by inspection, copying, or publication of the photographs. Indeed, it does not even require disclosure where "good cause," whatever that may be, is shown. Section 406.135(2)(a), states only that the "court, upon a showing of good cause, *may* issue an order authorizing any person to view or copy a photograph or video recording of an autopsy." The court retains discretion under this statute not to release the materials even when good cause has been shown. Moreover, the legislature has done nothing to define "good cause," other than to indicate that "the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form." These criteria do nothing to ensure that a court's discretion will be confined so that it will allow inspection of materials that will not cause the harm that supposedly justifies the exemption. In fact, the statute does not require the court to release materials under any knowable circumstances. Instead, this part of the statute simply transfers legislative powers to the judiciary and recommends factors for the judiciary to consider in making ad hoc determinations of whether ad hoc access will be allowed to particular records. This creates yet another constitutional defect in

Section 406.135. The Legislature may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.[8] The Fifth District contends that "acceptance of the delegation argument would make every other statute authorizing the courts to act upon a showing of good cause constitutionally suspect," citing ten statutes. 821 So. 2d at 394 n.4. In fact, only two of the ten cited statutes refer to "good cause" at all and do not employ the "may" mechanism.

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[8] *See Sims v. State*, 754 So. 2d 657 (Fla. 2000); *B.H. v. State*, 645 So. 2d 987, 991-92 (Fla. 1994); *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1979); *State v. Atl. Coast Line R.R.*, 56 Fla. 617, 47 So. 969 (1908). The Legislature may "enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials" to administer the law, but only "within definite valid limitations" to allow "operation and enforcement of the law within its expressed general purpose." *Atlantic Coast Line Railroad Co.*, 56 Fla. at 636-37, 47 So. at 976. Chapter 2001-1 does not provide sufficiently definite, valid limitations to allow for the complete operation and enforcement of the exemption. Instead, the legislature has left the courts to determine what constitutes "good cause" for the disclosure of the autopsy records at issue and, to the extent that the legislature has provided guidance with respect to that determination, it has done so on the basis of criteria that are impermissibly based on the past or future expression of the requester. The Florida Supreme Court held a similarly imprecise statute regulating speech to be an invalid delegation of legislative authority in *Brown v. State*, 358 So. 2d 16, 20 (Fla. 1978). The statute in that case made it a misdemeanor to use "profane, vulgar and indecent" language in any public place or private premises within the hearing of others. By leaving to the courts the task of giving meaning to these imprecise terms, the legislature had improperly delegated its legislative authority. "The Florida Constitution requires a certain precision defined by the legislature, not legislation articulated by the judiciary." *Id.* at 20.

The Fifth District bypassed the argument that use of the "good cause" standard leaves section 406.135 overbroad noting that the Legislature has used the "good cause" standard in section 119.07(7)(a), Fla. Stats. (2001), to restrict the scope of one other Public Records Law exemption, *id.* at 394-95, and that "good cause" has been used regularly in other contexts, such as for showing why a lawsuit should not be dismissed for lack of prosecution. *Id.* at 395 n.5. But neither of these observations solves the problems found in section 406.135(2)(a). Section 119.07(7)(a) abrogates exemptions that had been in existence since 1973, see ch. 73-176, Laws of Florida, so the exemption itself was not subject to review under article 1, section 24(c) of the Florida Constitution. Even, therefore, if the good cause provision of section 119.07(7)(a) were completely ineffective to limit the scope of the exemption, the exemption itself still would be valid because of its enactment prior to the adoption of article I, section 24(c) in 1992. In addition, section 119.07(7)(a) does require a court to release records upon a showing of good cause. So, an applicant under section 119.07(7)(a), unlike an applicant under section 406.135(2)(a), at least has the hope that if he or she shows good cause, the court will have no discretion other than to release the records. Finally, the judicial development of "good cause" standards in other contexts does nothing to inform the court about whether there is "good cause" to release an autopsy photograph. While it may be well established that a failure to prosecute a lawsuit should be excused by "proof of a calamity or proof of an opposing party's actions which prevented the plaintiff from prosecuting the cause," *Levine v. Kanlan*, 687 So. 2d 863, 865 (Fla. 5th DCA 1997) (cited by the Fifth District, 821 So. 2d at 395 n.5, as showing that "courts already know the meaning of good cause"), the definition

offers no guidance at all about how to decide good cause for overriding the exemption created by section 406.135.

This type of exemption by delegation to the courts offends article I, section 24(c) in much the same fashion that the defendants' request for a narrowing construction of the exemption in the *Halifax* case offended article I, section 24(c). "[I]n enacting exemptions to Florida's public disclosure laws, the legislature has an express constitutional obligation to tailor such an exemption so that it is no broader than necessary to accomplish the exemption's stated purpose." *Halifax Hospital Medical Center*, 724 So. 2d at 570. By allowing the judiciary to decide which autopsy records will be exempt, the Legislature has failed to exercise its constitutional duty.

B. Section 406.135 May Not be Applied Retroactively.

In *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 784 So. 2d 438 (Fla. 2001) ("*Memorial Hospital II*"), this Court reaffirmed its view that the right of access granted by the Public Records Law and article 1, section 24 of the Florida Constitution "is a substantive right."[9] Classification of the right of access as substantive is significant because "retroactive abolition of substantive

[9] *See Mem. Hosp.-W. Volusia. Inc. v. News-Journal Corp.*, 784 So. 2d 438, 441 (Fla. 2001) ("*Memorial Hospital II*"); *see also Allen v. Butterworth*, 756 So. 2d 52, 66 (Fla. 2000) (holding legislature "has the authority to define the substantive right to public records" but not the power to regulate "the procedure for public records production in capital cases"); *Henderson v. State*, 745 So. 2d 319, 326 (Fla. 1999) (construing public records law as substantive).

vested rights is prohibited by due process considerations."[10]

There can be no doubt but that Campus Communications' substantive right of access to the records at issue vested prior to the March 29, 2001, enactment of section 406.135, because the records came into the public domain on February 19, 2001, the date on which the autopsy was conducted. The Public Records Law operates to "place[ ] the books on the table." *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078 (Fla. 1984).[11] In addition, Campus Communications requested the records on March 16, thirteen days before enactment of section 406.135. At the time that the request was made, the medical examiner had no statutory basis to deny the request and he asserted no basis to deny the request. The only basis for denying the request was the improvidently granted temporary injunction that the trial judge ultimately vacated. Campus Communications was entitled to production of the records at the time that it made its request.

In *Cannella*, this Court held that delay in the production of public records is antithetical to the purpose of the law. "Delaying inspection . . . is not within the legislative

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[10] *Metropolitan Dade County v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 503 (Fla. 1999).

[11] The law plainly had that impact because Steve Bohannon was allowed to inspect the records on February 21, 2001. The prior release of records to a member of the public undermines the justification for withholding the records from other members of the public. *See, e.g., United States v. Camacho*, 22 Media L. Rep. (BNA) 1845, 1849-50 (S.D. Fla. 1994) (allowing CNN access to victim photographs where other members of the press previously had access to same photographs) (Marcus, J.).

scheme." *Id.* at 1076, Section 119.11, Florida Statutes, plainly recognizes the immediate vesting of the right to inspect and copy records in its creation of not only a right to seek immediate judicial enforcement of the statute, but also a right to an expedited judicial determination of such a claim. Significantly, Campus Communications' right to inspect and copy the records arose not only under chapter 119, but also under article I, section 24(a), of the Florida Constitution which provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, other persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, section 24(a), adopted in 1992, "elevated the public's right to government in the sunshine to constitutional proportions."[12]

Article I, section 24(c) of the Florida Constitution specifies that the right of access "shall be self-executing."[13] Thus, even independent of the clear and specific mechanism of chapter 119, Campus Communications' right of access to the records at issue would have vested by virtue of the mandate of article 1, section 24(a).

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[12] *Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998) (citing *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. 3d DCA 1967)).

[13] A self-executing right "lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without aid of legislative enactment." *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960).

That the Legislature may have been contemplating legislation to create an exemption to the disclosure requirements of the Public Records Law and to article I, section 24(a) at the time that Campus Communications submitted its request could not have prevented Campus Communications' rights from vesting at the time of its request or earlier. To hold otherwise would authorize every public official to withhold public records merely because of the mere possibility that legislation would be passed to exempt the requested record from the law.[14] This could eviscerate the law by authorizing the indefinite withholding of records whenever there was a possibility of new legislation. Would the filing of a bill alone be regarded as a sufficient basis for a public records custodian to withhold a record? Would committee action be sufficient? Should courts stop enforcing the law if its repeal is simply advocated? Could a public official be deemed to have violated the law if he or she withheld a record because the law might be amended, but it was not? How long should courts await legislative action? These questions demonstrate that the rule of law must be that a public records custodian may not withhold records once they have been requested even though a prospect exists for the law to change.

Traditional principles governing the determination of whether a statute can, consistent with due process, be applied retroactively, also lead to the conclusion that

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[14] Because Campus Communications submitted its request for access to records *before* the Legislature acted, the Court need not decide in this case whether a member of the press or public that requested the records *after* the Legislature acted would have a vested substantive right.

Campus Communications' right to inspect and copy the photographs, videotapes, and audiotapes vested. "Despite formulations hinging on categories such as 'vested rights' or 'remedies,' it has been suggested that the weighing process by which courts in fact decide whether to sustain the retroactive application of a statute involves three considerations: (1) the strength of the public interest served by the statute, (2) the extent to which the right affected is abrogated, and (3) the nature of the right affected."[15] Merely labeling a statute as "remedial"[16] does not make it so[17] and the Fifth District acknowledged as much, 821 So. 2d at 398, but then avoided retroactivity balancing analysis by asserting that one's right of access to public records is simply not a vested right protected by due process because it is "public" right, rather than a "private" right. *See* 821 So. 2d at 398-401. The cases from other jurisdictions cited for the Fifth District for this dichotomy

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[15] *State Department of Transportation v. Knowles,* 402 So. 2d 1155, 1158 (Fla. 1981).

[16] The Fifth District asserted that a statute should be treated as remedial if it is seeking to remedy a problem. 821 So. 2d at 396. All statutes typically seek to remedy problems. That does not, however, render them impervious to attack when they destroy vested rights. A "remedial" statute is one that leaves a substantive right intact, but alters the remedy for violation or exercise of that right. *See, e.g., Village of El Portal v. City of Miami Shares,* 362 So. 2d 275 (Fla. 1978); *Grammer v. Roman,* 174 So. 2d 443 (Fla. 2d DCA 1965). The exemptions in both *Roberts v. Butterworth,* 668 So. 2d 580 (Fla. 1996), and *City of Orlando v. Desiardins,* 493 So. 2d 1027 (Fla. 1986), kept the right of access to records intact, but altered the remedy for exercising that right by delaying the time for inspection and copying.

[17] *See State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So. 2d 55 (Fla. 1995); *Arrow Air, Inc. v. Walsh,* 645 So. 2d 422 (Fla. 1994); *State v. Lavazzoli,* 434 So. 2d 321 (Fla. 1983).

are inapposite because they do not involve public records at all.[18] The Florida cases cited by the Fifth District also are inapposite because they do not involve public records.

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[18] *See Hodges v. Snyder,* 261 U.S. 600 (1923) (legislature can amend law after court enters judgment requiring closure of school based on prior law); *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. 421 (1855) (Congress can enact law requiring bridge to remain notwithstanding an injunction requiring its removal based on prior law); *Mendly v. County of Los Angeles,* 28 Cal. Rptr. 2d 822 (Cal. Ct. App. 1994) (due to fiscal emergency, California limit welfare payments even after court entered judgment requiring counties to provide general assistance grants above current statutory levels); *Van de Kemp v. Gumbiner,* 270 Cal. Rptr. 907, 924 (Cal. Ct. App. 1990) ("when a government agency enters into a settlement agreement in the public interest with an entity subject to its authority and the agreement comes into clear conflict with subsequently enacted legislation, the legislation controls"); *Robinson v. City of Winfield,* 219 P. 273 (Kan. 1923) (individual has no vested right in property which prevents it from being taken for a public use under the power of eminent domain); *Holen v. Minneapolis-St. Paul Metro. Airports Comm'n,* 84 N.W.2d 282 (Minn. 1957) (legislature entitled to remove public hearing requirement after property owners near airport brought suit against the airport commission seeking to compel public hearing); *Yow v. Tishomingo County Sch. Bd.,* 172 So. 303 (Miss. 1937) (new law validated school district after taxpayer suit commenced to enjoin collection of taxes levied by illegally organized school district); *Becker v. Adams,* 181 A.2d 349 (N.J. 1962) (repeal of 1895 act allowing petition to form independent community was valid after filing of petition); *Bradford v. Suffolk County,* 15 N.Y.S.2d 353 (N.Y. App. Div. 1939) (state could legislatively authorize county "charge back" to town after judgment entered prohibiting charge back), *judgment affirmed as modified,* 28 N.E.2d 932 (N.Y. 1940); *Jackson County v. Jackson Educ. Serv. Dist.,* 752 P.2d 1224 (Or. Ct. App. 1988) (taxing district, as governmental subdivision, had no due process right not to have judgment affected by subsequent legislation); *Inman v. R.R. Comm'n,* 478 S.W.2d 124 (Tex. App. 1972) (law validating Railroad Commission injunction against trucking operations did not violate due process by rendering action against commission moot); *Leuch v. Egelhoff,* 51 N.W.2d 7 (Wis. 1952) (legislature could ratify city's illegal payments to tree trimming company after appellate court ruled for taxpayer).

They do, however, tend to support the principle that once a public record has been requested, the right to inspect and copy it has vested. For example, *City of Sanford v. McClelland,* 163 So. 513 (1935), held that "[a] vested right had been defined as an 'immediate, fixed right of present or future enjoyment.'" *Id.* at 514. *Division of Workers' Comp. v. Brevada,* 420 So. 2d 887, 891 (Fla. 1st DCA 1982), held in order for a right to have vested, "'it must have become a title, legal or equitable, to the present or future enforcement of a demand.'" Section 119.07(1) of the Public Records Law provides that after a record is requested the "person who has custody of [the] public record shall permit the record to be inspected . . . and shall furnish a copy"). Section 119.11(1)(a), Florida Statutes, recognizes the immediate enforceability of the right, providing, "Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing." This Court, of course, has held that "Delaying inspection . . . is not within the legislative scheme." *Cannella,* 458 So. 2d at 1076.

Had the Fifth District performed the balancing required to determine whether a statute can be retroactively applied, it would have found retroactive application of the statute unconstitutional.

The public interest which the respondents claimed the statute would serve was the prevention of emotional distress to the Earnhardt family and to the families of others whose relatives are autopsied. In assessing strength of this interest, the Court should consider that autopsy photographs have been open to public inspection for decades since the Public Records Law was enacted in 1909 and that there are few instances of such access ever causing any harm to family members whatsoever. It also

should consider that when access allowed by the law has been abused, tort remedies have been readily available to compensate and punish.[19] Tort law has served as a powerful deterrent to prevent the misuse of records released by public officials and would in this case. If *The Independent Florida Alligator* were to use its right of access to the photographs to publish them and if that publication unjustifiably inflicted emotional distress on the Earnhardt family, it unquestionably would be subject to substantial claims for compensatory and punitive damages.

In assessing the second factor in this Court's retroactivity test, the Court should consider that abrogation of the right is complete. Although the legislation creates the possibility that records may be released through a court order in some circumstances,[20] it

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[19] *See, e.g., Williams v. City of Minneola,* 575 So. 2d 683 (Fla. 5th DCA 1991) (police officers violated the rights of the mother and sister of a 14-year-old boy who had died of a drug overdose by gratuitously showing videotape of boy's autopsy and gratuitously displaying autopsy photos in a party atmosphere where the audience was joking and laughing); *Armstrong v. H&C Communications, Inc.,* 575 So. 2d 280 (Fla. 5th DCA 1991) (holding that television stations could be held liable for intentional infliction of emotional distress arising from the broadcasting of videotape of skull of a child shown by medical examiner).

[20] The criteria specified by the Legislature for allowing access are themselves constitutionally deficient because they invite, if not require, judges to deny access based on the viewpoint of the requester. Even if the state has no constitutional obligation to grant access, *see L.A. Police Dep't v. United Reporting Pub'g Corp.,* 120 S. Ct. 483 (1999), once it decides to grant access, it may not consistent with the First Amendment and Equal Protection Clause deny access to some on the basis of viewpoint. *Cf. Legal Servs. Corp. v. Velazquez,* 121 S. Ct. 1043, 1050 (2001) (government cannot condition subsidies on basis of viewpoint); *Good News Club v. Milford Cent. School,* 121 S. Ct. 2093 (2001)

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cannot be denied that in many instances the new law denies access to records that previously had been allowed. Indeed, in this case the Earnhardts successfully argued that Section 406.135 had destroyed Campus Communications' right of access.[21] The availability of the autopsy

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(exclusion of Christian children's club from meeting after hours was unconstitutional viewpoint discrimination); *National Endowment for the Arts v. Finley,* 118 S. Ct. 2168 (1998) (NEA may not "leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints"); *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819 (1995) (state university may not disburse student activity fees on viewpoint-based terms); *Anderson v. Cryovac,* 805 F.2d 1, 9 (1st Cir. 1986) ("danger in granting favorable [access] to certain members of the media is obvious; it allows the government to influence the type of substantive media coverage that public events will receive"). The court in the instant case expressly grounded its decision denying access, in part, on the viewpoint of the requesters that autopsy photographs under some circumstances should be published. (R.15-2469-81 at ¶¶ 15-16) (referencing past and future publications of the requesters as justification for denying access). Both the order and section 406.135 abridge the First Amendment and deny equal protection by denying on the basis of viewpoint access to records made available to others.

[21] In Point II *infra,* petitioner maintains its assertion that good cause has been demonstrated and that the order below should be released on that basis. As noted, however, section 406.135(2)(a) vests discretion in the trial court to withhold records even in the face of a showing of good cause. Unless, therefore, this Court finds a way to construe section 406.135(2)(a) as requiring release upon a showing of good cause and further construes "good cause" as encompassing the showing made here, the trial court's ruling on this point cannot be reversed. Before enactment of chapter 2001-1, records could be accessed irrespective of the reason for which they were sought. *See Booksmart Enters., Inc. v. Barnes & Noble Coll. Bookstores, Inc.,* 718 So. 2d 227, 228, n.2 (Fla. 3d DCA 1998) ("reason for wanting to view and copy the documents is irrelevant"); *Staton v. McMillan,* 597 So. 2d 940, 941 (Fla. 1st DCA 1992), *review dismissed sub. nom., Staton v. Austin,* 605 So. 2d 1266 (Fla. 1992) (reasons for seeking access "are immaterial"); *Lorei v. Smith,* 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985) ("legislative objective

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report does not as the trial court found and the Fifth District accepted provide an adequate substitute for the photographs themselves. It is only the photographs that will either corroborate or refute the accuracy of the autopsy report.

As shown by numerous news articles filed with the trial court, autopsy photographs have been used by investigators for years to demonstrate that medical examiners make mistakes or, in some instances, intentionally seek to cover up wrongdoing by filing erroneous autopsy reports. And a strong case can be made, *see* Point II *infra,* that the photographs sought here would tell the press and the public much about whether NASCAR engaged in an intentional obstruction of a law enforcement investigation by falsely asserting Earnhardt's seat belt broke,[22] whether law enforcement officials failed

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. . . was to insure . . . the right freely to gain access to governmental records. The purpose for such inquiry is immaterial."), *review denied,* 475 So. 2d 695 (Fla. 1985); *News-Press Publishing Co. v. Gadd,* 388 So. 2d 276, 278 (Fla. 2d DCA 1980) ("the newspaper's motives [for seeking the documents], as well as the hospital's financial harm and public harm defenses, are irrelevant in an action to compel compliance with the Public Records Act").

[22] The manufacturer of the seat belt, Bill Simpson, reportedly filed a libel action against NASCAR that contends that NASCAR's assertion that he caused Earnhardt's death are false. *See* "Seat Belt Maker Files Suit Against NASCAR – Simpson Says He Was Unfairly Blamed in Earnhardt's Death," http://www.click2houston.com/sh/sports/nascar/stories/nascar-12334520020213-110205.html (Feb. 13, 2002); "Simpson Seeks Public Apology," http://espn.go.com/rpm/wc/2002/0211/1327350.html (Feb. 12, 2002) (quoting Simpson as saying, " 'Everyone who has ever dealt with NASCAR has acquiesced to them and nobody will stand up to them. But they picked the wrong guy this time. I'm not going away quietly and they deserve to pay for what they did to me and my company's reputation' ").

to detect this possible obstruction, and whether the medical examiner properly determined the cause of death. But whether the particular photographs at issue in this case contain such information is irrelevant to the constitutionality of the exemption. The fact is that autopsy photographs often do contain such valuable information and the exemption here at issue has destroyed the accessibility of it in many instances.

Finally, the nature of the right affected is a fundamental constitutional right. The right of access to public records always has been regarded as a paramount value in Florida.[23] It assures government accountability and protects the public and individuals against both negligence and corruption. Through their adoption of article I, section 24 of the Florida Constitution, the people of the State of Florida eliminated any doubt that the courts should accord their right of access fundamental stature. *Memorial Hospital II,* 784 So. 2d at 481. Today, the right of access to public records is plainly a substantive right of the highest value.

Weighing all three of these factors together leads to the conclusion that this Public Records Law exemption cannot, consistent with due process, be applied retroactively. That is not to say that no Public Records Law exemption ever could be applied retroactively. Where the importance of the exemption is great or the exemption does not deny access entirely or both, an exemption can be retroactive and constitutional. Examples of such exemptions are found in *Roberts v. Butterworth,* 668 So. 2d 580

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[23] *See Generally Shevin v. Byron, Harless. Schaffer, Reid & Assocs.,* 379 So. 2d 633, 640 (Fla. 1980).

(Fla. 1996); and *City of Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986). In both cases, this Court upheld exemptions essential to protect the work product of agency attorneys. Unlike the exemption created by the section 406.135, these exemptions served important interests with respect to all of the records to which they applied[24] and simply would *postpone* the time at which a requester could have access to the records until after the conclusion of the litigation. These features of the exemptions allowed their retroactive application. The Legislature could have incorporated similar features into section 406.135 by delaying access for a certain period of time, but chose not to do so.

II.

Campus Communications Should Have Been Granted Access Under Section 406.135

In the event that the Court upholds the constitutionality of section 406.135, it then should consider whether the circuit court erred in holding that Campus Communications had not shown good cause under section 406.135 to inspect and copy the photographs. The Court's ruling is based on findings that are not supported by substantial competent evidence and legal conclusions that are incorrect.

Section 406.135 first suggests that a trial judge should consider whether access to the records is necessary for public evaluation of governmental performance. The

[24] All work product, by definition, would reflect a "mental impression, conclusion, litigation strategy, or legal theory" of an agency attorney. *See* Fla. Stat. §119.07(3)(1).

circuit court erred as a matter of law in interpreting this criterion as narrowly as it did. Access to autopsy reports, including photographs, has been regarded as necessary for such evaluation for many years. The Legislature first enacted the Public Records Law in 1909. 1909 Laws of Florida, chapter 5942, sec. 1. The statute stated: "All state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida." No exemption was made for autopsy reports. The law has been amended innumerable times since 1909, but until this year, there was no general exemption for autopsy reports and for good reason. Access to autopsy reports helped to ensure that the medical examiner did his job correctly and inspired public confidence in conclusions reached by the medical examiner. Both are important objectives because the medical examiner is in many ways the public's first line of defense against criminal activity, product liability, and disease. That official is required to determine the cause of a death that occurs by crime or accident or under any unusual circumstances.[25] The ability to review the medical examiner's work is therefore vital to the public and the press.[26] Closing objective records such as

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[25] Autopsies are authorized by the Medical Examiner by section 406.11, Florida Statutes, when any person dies in the state of criminal violence, by accident, by suicide, suddenly, when in apparent good health, unattended by a practicing physician, in prison or a penal institution, in police custody, in any suspicious or unusual circumstance, by criminal abortion, by poison, by disease constituting a threat to public health, by disease, injury, or toxic agent resulting from employment; when a dead body is brought into the state without proper medical certification; or when a body is to be cremated, dissected, or buried at sea.

[26] Reporters regularly have exercised that right to investigate and to report about criminal activities, accidental deaths and other

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photographs to the public, substantially interferes with the public's ability to evaluate the medical examiner's work. It is left solely with the subjective autopsy report and no ability to evaluate its accuracy.

The circuit court acknowledged that access to the records also might help to evaluate NASCAR's safety requirements, but deemed this to be a "private" matter, not involving governmental performance. NASCAR conducts races, however, only with the approval of the government. The Legislature certainly has the power to stop races that regularly result in the deaths of drivers or to condition their continuance on the organizer taking certain safety precautions. The photographs that were sought in this case could help to confirm that Dale Earnhardt's death could have been prevented had certain safety equipment been required by NASCAR. That might lead to legislation to make racing safer.

The intrusion into the family's right to privacy by inspection and copying of the records cannot be found to invade the family's privacy rights at all because the family would not even be aware of the inspection or copying. The misuse of autopsy photographs *after* they have been inspected and copied can, of course, be tortious. "One who behaves outrageously with regard to pictures of a dead body can be presumed to know that severe emotional

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important matters. *See* Carl Hiaasen, "Banning Autopsy Photos is Dangerous," *The Miami Herald* (Mar. 11, 2001) ("Many times, deaths that initially were ruled accidents or suicides have later been revealed as homicides. These crimes were uncovered because someone took a fresh look at the case. It might have been a family member or a friend, an insurance investigator or even a journalist.").

distress will be inflicted thereby on those who were closely related to the deceased, should those survivors become aware of the tortfeasor's behavior." *Williams v. City of Minneola,* 575 So. 2d 683, 693 (Fla. 5th DCA 1991). Similar conclusions have been reached in other cases.[27] No case, however, has held that the mere inspection and copying of autopsy records is an invasion of a family's privacy rights.

Another factor that the circuit court should have considered in weighing the request for access was that Earnhardt invited intense public scrutiny of every aspect of his life through his decision to engage in a sport that is extremely dangerous, that regularly results in the deaths of drivers, that attracts millions of fans and television viewers, and that makes millions of dollars for race organizers, participants and sponsors. A family that has invited so much public attention and that has benefited financially and otherwise by such extensive public attention cannot have the same expectation of privacy as individuals who have not engaged in such activities.[28]

The circuit court should have concluded that allowing inspection and copying of the photographs is the least intrusive means available to satisfy the request for access

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[27] *See, e.g., Armstrong v. H&C Communications, Inc.,* 575 So. 2d 280 (Fla. 5th DCA 1991) (holding that television stations could be held liable for intentional infliction of emotional distress arising from the broadcasting of videotape of skull of a child shown by medical examiner).

[28] *See generally Bartnicki v. Vopper,* 121 S. Ct. 1753, 1765 (2001) ("One of the costs associated with participation in public affairs is an attendant loss of privacy").

because less intrusive means, such as the limited access allowed to a court-appointed expert, cannot quell the controversy surrounding Earnhardt's death. The availability of a written autopsy record cannot suffice because it plainly does not contain all of the same information available from photographs. Moreover, even if the photographs showed nothing more than the autopsy report, access to the photographs still would be necessary to confirm this. As shown in the record, autopsy reports often are not accurate and inspection of photographs can demonstrate this. At a minimum, the Court should reverse the denial of the motion for new trial that was based on the trial court's exclusion of news articles showing the relevance of the photographs to an important public controversy.

III.

Judgment Should Have Been Entered Against the Earnhardts' Disclosural Privacy Claim

Irrespective of how the Court rules on section 406.135, it should vacate the permanent injunction sealing the records. The Earnhardts requested that that relief in their complaint, but there never was any basis for that. This issue is also reviewable *de novo* because it rests on purely legal matters. *See Smith,* 2002 WL 31051569 at *2.

A. The State Constitutional Privacy Right Does Not Limit the Public Records Law

Article 1, section 23, which amended the Constitution on November 4, 1980, provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise

construed herein. *This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.*" (Emphasis added). The second sentence of the section "was added to prohibit use of the privacy amendment to impede public access to public information.[29] "The legislature designed the amendment to control the collection of information rather than disclosure."[30] Thus, "[a]lthough legislative revision of [the Sunshine and Public Records Law] remains possible, the courts are precluded from invalidating or creating exceptions to these laws on the basis of" article 1, section 23.[31] This Court has repeatedly adhered to this view.[32]

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[29] R. D. Woodson & Ricki L. Tannen, *Federal Constitutional Privacy & The Florida Public Records Law: Resolving the Conflict,* 33 U. Fla. L. Rev. 313, 337 (1980) (footnotes omitted) (citing Public Administration Clearing Service, [sic]

[30] *Id.* at 337 (footnotes omitted).

[31] Joseph S. Jackson, *Interpreting Florida's New Constitutional Right of Privacy,* 33 U. Fla. L. Rev. 565, 580 (1981); *see also* Gerald B. Cope, *A Quick Look at Florida's New Right of Privacy,* 55 Fla. Bar J. 12, 12-13 (1980).

[32] *See Post-Newsweek Stations. Fla., Inc. v. Doe,* 612 So. 2d 549, 552 (Fla. 1992) (article 1, section 23 "has not been interpreted to protect names and addresses contained in public records"); *Michel v. Douglas,* 464 So. 2d 545 (Fla. 1985) (article I, section 23 could not be invoked by employees of public hospital to block access to hospital personnel records that were public records); *Forsberg v. Hous. Auth. of City of Miami,* 455 So. 2d 373 (Fla., 1984) (public housing tenants had no right to enjoin release of information provided by them to public housing authority); *see also Borges v. City of West Palm Beach,* 858 F. Supp. 174, 178 (S.D. Fla. 1994) (recognizing that the Florida Supreme Court has found that article I, section 23 cannot be construed to limit the Public Records Law).

B. There is No Federal Constitutional Privacy Right that Limits the Public Records Law

The federal constitution also provides no basis for the injunction. This Court held in *Shevin v. Byron, Harless, Schaffer & Associates,* 379 So. 2d 633 (Fla. 1980): "The Supreme Court may some day breathe life into the privacy interest asserted by respondents, but, until that occurs, we conclude that there does not exist, under the facts of this case, a constitutionally protected interest sufficient to prevent the public from seeing the consultant's papers." *Id.* at 638.

This Court subsequently rejected assertions of the supposed federal "right" in a variety of circumstances and in each case it has concluded that no such federal right exists to block access to public records.[33] In *Michel v. Douglas,* 464 So. 2d 545, 546 (Fla. 1985), the Court explicitly "found no state or federal disclosural privacy right to exist." In the context of autopsy photographs and videotapes, the Fifth District itself had held in *Williams,* 575 So. 2d at 687, that "neither a custodian of records nor a person who is the subject of a record can claim a constitutional right of privacy as a bar to requested inspection of a public record in the hands of a government agency."

[33] *See Michel,* 464 So. 2d 545 (employees of public hospital had no federal constitutional right to stop access to hospital personnel records that were public records); *Tribune Co. v. Cannella,* 458 So. 2d 1075 (Fla. 1984) (police officers had no constitutional privacy right to delay production of their personnel files); *Forsberg,* 455 So. 2d 373 (public housing tenants had no right to enjoin release of information provided by them to public housing authority).

CONCLUSION

The certified questions should be answered negatively and the decision below should be vacated with instructions for entry of an order requiring the medical examiner to produce the records at issue for inspection and copying.

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I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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